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BEYOND THE BUZZWORDS: A PERSPECTIVE ON INTEGRATED COASTAL AND OCEAN MANAGEMENT IN CANADA

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Introduction

It is now more than five years since the *Oceans Act* came into force as Canada's modern legal framework for integrated coastal and ocean management (ICOM).¹ Although there have been several integrated management initiatives at the national, regional and provincial level, the assessment of the record to date is not a simple matter. This difficulty is well illustrated by the recent Parliamentary review of the *Oceans Act* and the federal government's response.² The House of Commons' Standing Committee on Fisheries and Oceans (Standing Committee) recently concluded that

the Oceans Act is fundamentally sound and [the Committee] does not recommend any major amendments to the Act at this time. Nevertheless, the Committee has some concerns over the administration of certain aspects of the Act. Certain principles and programs that were key elements of the Act do not appear to have been as fully implemented as they could or should have been. In addition, a number of more specific concerns were raised particularly with respect to the creation of Marine Protected Areas and Integrated Management (Part II, Oceans Management Strategy) and marine services (Part III, Powers, Duties and Functions of the Minister) that the Committee believes should be given due consideration.³

¹ S.C. 1996, c. 31. Introduced as Bill C-98 in 1995, it was re-introduced as Bill C-26 and adopted in the 1995-96 legislative session. The *Oceans Act* was assented to on 18 December 1996 and came into force on 31 January 1997.

² The review of the *Oceans Act* by the Standing Committee on Fisheries and Oceans is required by s. 52 of the act (*ibid*). This section provides for the comprehensive review of the administration of the act and recommendations for amendments or administration.

³ See the various review reports of the Standing Committee and in particular the fourth *Report on the Oceans Act*, Wayne Easter, M.P., Chair (House of Commons, Ottawa: October 2001)(hereafter *SCFO Fourth Report*).

The Standing Committee had held hearings across Canada and received many inputs from diverse interests groups. These inputs are visible in the 16 recommendations proposed by the Standing Committee.

In its response to the Standing Committee's recommendations the federal government is of the view that although there is still much to be done, much has been accomplished at the same time.⁴ The federal government expressed pleasure that the act is seen as fundamentally sound. It listed many coastal and ocean initiatives as part of the record of the administration of the act. The specific responses provided to each recommendation are more reserved. Through guarded language the federal government disagreed with⁵ or offered explanation or clarification of the basis⁶ of many of the recommendations. Where the government tended to agree it showed a willingness to consider or agree with in part⁷ or simply confirm that the recommendation was already being followed in whole or in part.⁸ Only one recommendation was agreed to without

⁴ *Government Response to the Fourth Report of the Standing Committee on Fisheries and Oceans, "Report on the Oceans Act"* (Ottawa: Department of Fisheries and Oceans, March 2002). Much of the federal government response emanates from the Department of Fisheries and Oceans which was the principal institution addressed by the Standing Committee.

⁵ Responses to: recommendation one (enactment of regulations under the act); recommendation two (references to fishermen and their organizations to be consulted under the act); recommendation seven (converting the minister's discretionary duty to consult to an obligation in s. 33[3]); recommendation 12 (minister should play a proactive lead role), where the government avoids a direct response to the criticism implicit in this recommendation, and provides information on various activities including the process for the long overdue national oceans management strategy; recommendation 16 (cost-effective manner of delivery of marine services). Ibid.

⁶ Responses to: recommendation four (establishment of an interdepartmental committee for stewardship and sustainable management); recommendation 11 (DFO's primary responsibility for ocean management in Canada); recommendation 13 (marine services or ice-breaking fees); recommendation 14 (application of marine service fees to ferries). Ibid.

⁷ Responses to: recommendation two (annual state of the oceans report), where the government response in essence agreed to produce such a report every three-to-five years; response to recommendation six (definition or clarification of terms in s. 35[1]), where government agrees with the need for definition of various terms but disagrees with a legislative intervention to do so. Ibid.

⁸ Responses to: recommendation five (publication of information on MPA sites in the Oceans Program Tracking System); recommendation eight (environmental assessment under federal legislation of offshore exploration in the Gulf of St. Lawrence); recommendation nine (offshore development guidelines to better inform developers of licence limitations); recommendation ten (fisherfolk representation on the Canada-Nova Scotia Offshore Petroleum

comment.⁹

This exchange is evidence of the intertwining political with bureaucratic agendas and processes over the key legislation prescribing integration in Canada. It serves to illustrate a major challenge for scholar and practitioner alike: how to assess the record on integration to date in the context of conflicting claims. The assessment of integrated coastal and ocean management (ICOM) initiatives is difficult for a number of reasons including complexity, lack of well-established and documented baselines, unclear or insufficient indicators, lack of systematic project monitoring and time frame of review to capture stated short, medium to long-term goals. The identification of indicators can be particularly difficult as it may not always be possible to quantify results, and important as qualitative assessments may be, they are necessarily prone to highly subjective interpretation moderated only by political justifications and bureaucratic constraints. This complex task is further accentuated in the context of states with complex systems of government operating in situations of geographical, ecosystemic, political, socio-economic and cultural diversity. Federal states are a case in point. Understanding how well a particular initiative is doing may depend on individual observation, motive, context and point in time. Much is at stake: Canada's ocean activities account for an estimated \$20 billion in annual domestic economic activity, and this figure does not represent the total value of the country's seaborne trade.¹⁰ In addition, the fate of coastal and marine ecosystems, and the well-being of innumerable aboriginal and coastal communities also depend on the management of the marine environment.

This chapter attempts to rationalize an approach to assessing federal policy, planning or management initiatives by developing a theoretical framework drawing from Canadian ICOM practices. It then proceeds to consider specific experiences in the context of this framework in Canada. The experiences are a mixture "old" and "new" federal initiatives at the national and regional levels. The Atlantic Coastal Action Program (ACAP) can be considered a "mature" initiative because of its longevity (10 years in existence). *Canada's Oceans Strategy: Our Oceans, Our Future (Oceans Strategy)* is only a few months old, but it was preceded by a five-year gestation period. The Eastern Scotian Shelf Integrated Management Initiative (ESSIM) is still at a gestation phase, but the initiative commenced in 1999. Despite the "immaturity" of the latter two, both provide useful insights into the concept and practice of integration, and for this purpose offer a useful comparison to ACAP. All three have grappled or are grappling with integration in their own individual way, but in a common constitutional context. The *Oceans Strategy* is different from the other two in that it is national in vocation and character. ACAP and

Board). Ibid.

⁹ Response to recommendation 15 concerning the provision of the results of the Treasury Board evaluation of marine services or ice-breaking fees to the Standing Committee. Ibid.

¹⁰ *Canada's Oceans Strategy: Our Oceans, Our Future* (Ottawa: Fisheries and Oceans Canada, 2002), at 2.

ESSIM are regional, both in the Atlantic, but are led by two different lead agencies, respectively Environment Canada and DFO. All three offer a challenge to assessment.

The authors identify questions to be asked and factors to be weighed in relation to both the development process of an initiative, the decision as manifested in text, and actual results where these are ascertained. It is submitted that the questions and factors put forward can reasonably be expected to facilitate or constrain the pursuit of the integrated approach in Canada. The assessment of the integration record requires a sifting of buzz words. The analysis leads to a qualitative assessment and conclusions on what could or should have been achieved, or likely to be achieved, given intended objectives and the influence of relevant factors. In effect, this approach produces “relative judgments.”

Because of the experimental nature of this study, the authors do not embark on in-depth influence analysis, but rather propose what they hope will be a useful systematic approach for more in-depth analysis of case studies. Although applied in a federal context, the analytical framework would be equally useful to the study of provincial initiatives. Although not a purpose of this chapter, a study of provincial initiatives can also be expected to provide useful insights. The authors draw on primary materials, mainstream and gray literature, and personal knowledge of various processes and initiatives they themselves have participated in. Time constraints did not permit interviewing of actors.

Context

ICOM initiatives in Canada occur in theatres of biogeophysical, socio-economic and cultural diversity. Canada borders on the Arctic, Atlantic and Pacific oceans. The differences between these three marine environments is further accentuated by intra-regional ecosystemic diversity.¹¹ In addition to the oceans, the Great Lakes constitute significant hydrospace which is subject to many of the interests and activities that marine areas are subject to. In all regions, Canada also has extensive river systems with an intricate relationship to the marine environment. The subject of lakes and rivers has repercussions for the definition of management areas that might need to include watersheds.

The socio-economic and cultural differences are also significant. New Brunswick is the only officially bilingual province, while Newfoundland and Labrador is the province with the highest persistent unemployment rates in Canada. The level of wealth across the country is very variable, with the poorest provinces and highest rates of unemployment being in the Atlantic

¹¹ The National Marine Conservation Areas System Plan developed by the Parks Agency lists 29 different marine regions in the Arctic Ocean, Atlantic Ocean, Great Lakes and Pacific Ocean, each with distinct physical and biological characteristics; <http://parkscanada.pch.gc.ca/nmca/nmca/index.html> (accessed 28 October 2002). See also *Guiding Principles and Operational Policies* (Parks Canada, Minister of Supply and Services Canada, 1994).

region. The Arctic region presents a totally different scene with a fragile environment, low population density, dominant aboriginal people presence and growing political consciousness and aspirations.

Questions and factors

Triggers

The drivers of the policy-making, planning or management process are a first consideration. Is the process a result of foresight or simply a reaction to an unforeseen problem, event or emergency? The challenge for the decision-maker is to remain ahead of events so as to avoid substituting reactive for proactive approaches. Reactive approaches may lead to inefficient responses and defensive posturing, possibly characterised by optics more than content, in the light of uneasiness of political masters and public critique.

Sectoral and integrated coastal and ocean initiatives in Canada have been generally the result of triggers or pressures. The triggers have tended to be singular or series of events frequently leading to a crisis and which have served to prod government into action. These have not necessarily been unforeseeable and yet decision-makers remained unprepared. The 1999 Supreme Court of Canada's decision in *R. v. Marshall* triggered a series of important developments in aboriginal rights in coastal and ocean resource development, but in reality the growth in constitutional recognition of aboriginal rights was foreseeable as a result of preceding case law.¹² Since the *Constitution Act, 1982* there has emerged a pattern in the constitutional recognition of aboriginal rights in Canada.¹³ However, the Department of Fisheries and Oceans (DFO) was unprepared for the assertion of fishing and other rights by First Nation bands in areas licensed to other local resource users and the conflict this generated. The collapse of the northern Atlantic cod stocks in the early 1990s was the result of longstanding overfishing. It led to a series of haphazard political, management and fiscal responses by the federal government. The Atlantic Groundfish Strategy (TAGS) was one such federal response instituted as a result of the Northern Cod collapse in the 1990s.¹⁴

Pressures have tended to influence the development of initiatives as a result of osmosis.

¹² *R. v. Marshall*, [1999] 3 S.C.R. 533, in a split 3-2 decision. Prior to *Marshall* the Supreme Court of Canada had already confirmed the existence of an aboriginal right to fish for food, social and ceremonial purposes. *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

¹³ *Constitution Act, 1982*, s. 35(1).

¹⁴ For an overview of TAGS, see Newfoundland Fishery Education home page <http://www.stemnet.nf.ca/cod/tags1.htm> (accessed 28 October 2002); Standing Committee on Fisheries and Oceans, "The East Coast Report," <http://www.parl.gc.ca/InfocomDoc/36/1/FISH/Studies/Reports/fishrp01/03presenta-e.htm> (accessed 28 October 2002).

Pressures are influences resulting directly from larger policy initiatives or changes in the governance environment. In the 1990s the privatization drive across a range of government services affected maritime administration services. The introduction of marine service fees and privatization of oil spill response were part of this phenomenon. Somewhat similarly, the Atlantic Coastal Action Program (ACAP) was influenced by the trend for inclusive participation in resource management. ACAP thus employs a stakeholder-based approach under the influence of a growing trend in community-based co-management.¹⁵

Ideally in ICOM the decision-maker should be rationalizing decisions on the basis of projected goals and objectives based on foresight, in addition to responding to crises. ICOM is much more than crisis management. Sustainability requires ongoing costs/benefits assessment with reference to an ecosystem's ability to produce the intended goods and services.

Problem-response and baselines

There are three tasks to address in this factor. The first addresses to what extent, if at all, is a particular initiative problem-oriented, and at what scale? Is it responding to a problem as it has arisen, or is it anticipating it? The relevance of this question is for the assessment of the overall response (is it anticipatory or reactive?) and the clarity of stated goals and objectives. Naturally, clarity is highly desirable. At the same time, however, it will be important to ascertain whether goals and objectives leave room for flexibility to enable appropriate responses to unforeseen issues as they might arise. Ideally, an ICOM initiative should manifest a long-term vision and an ability to respond to issues as they arise while maintaining a steady course.

The second task is to ascertain the existence of an integrated approach and then to assess how it is formulated. The key concept of integration is central to ICOM and is widely recognized as a basic principle.¹⁶ It is a response to the sectoralization of the environment and, in a marine context, the piecemeal approach to ocean development that remains so pervasive in many parts of the world. Sectoralization frequently results in multiple use conflicts and adverse consequences on the marine environment because the activities of other users and the cumulative

¹⁵ J. P. Ellsworth, L.P. Hildebrand and E.A. Glover, "Canada's Atlantic Coastal Action Program: A Community-based Approach to Collective Governance," *36 Ocean & Coastal Management Journal* 121-142 (1997).

¹⁶ "Integration" as a principle of environmental planning in Principle 13 of the *Declaration of the UN Conference on the Human Environment*, <http://www.fletcher.tufts.edu/multi/texts/STOCKHOLM-DECL.txt> (accessed 5 November 2002). On the integration in an oceans context see: Arild Underdal, "Integrated Marine Policy: What? Why? How?" *Marine Policy* 159-169 (1980); Edward L. Miles, "Future Challenges in Ocean Management: Towards Integrated National Ocean Policy," in Paolo Fabbri, ed., *Ocean Management in Global Change* (London: Elsevier, 1992), 595-620; Jean-Pierre Levy, "A National Ocean Policy: An Elusive Quest," *Marine Policy* 75-80 (1993).

environmental impacts are not anticipated. The integrated approach requires a holistic approach, where local action must take place within the context of the “big picture.” Thus, the manner in which a problem is identified and formulated must take into consideration its context. The integrated approach also has implications for management area and institutional responses, which will be discussed below.

The third task concerns baselines. The function of baselines is to enable performance measurement against a starting point in fact and time. This is a requirement of any evaluation process to enable a quantitative and qualitative assessment of outputs, outcomes and impacts.

Management area

In the case of planning and management initiatives, provision for the definition of the operational area or the actual definition of such area is closely related to the problem addressed. Does the problem define the area, or does the area define the problem? These are two approaches.

The first approach suggests a functionalist approach, whereby area definition is premised by the full extent of the problem, its impacts and the response needs. Of the two, theoretically this is the more consistent with the integrated approach and in theory better enables an ecosystem-based approach, as long as the management area coincides with the relevant ecosystem. Size *per se* is not necessarily an issue. There could be management and administrative disadvantages, such as how far the logic of integration might take problem definition and identification of a relevant ecosystem, and the involvement of more institutional actors with different mandates. Ecosystem boundaries might not be easy to define and in any case are not likely to be permanent. A functionalist approach here would suggest that boundaries might need to be reviewed in the light of changing scientific evidence and understanding.

The second approach suggests an administrative premise, whereby a jurisdictional area is defined in advance, followed by an identification of problems in the area that can be addressed pursuant to institutional mandate. There is convenience, simplicity and clarity in the applicability of a mandate-based approach. These benefits might occur at the cost of relevance and effectiveness. A major difficulty here is that the problem might not be dealt with holistically and that an ecosystem-based approach might not be possible.

Both approaches have advantages and disadvantages. What is useful here is to ascertain to what extent these strengths and weaknesses are recognised in an initiative and the particular blend of approaches that might be adopted.

Knowledge base

The knowledge-base that the decision is drawing upon is a relevant factor and several questions thus arise. The first is what knowledge of the problem and management area is available. A lack

of knowledge could result in an initiative which is more politically than knowledge-driven.

How is that knowledge created and is it accessible? The integrated approach necessitates a multi-disciplinary knowledge of a problem, and this in turn might result in an interdisciplinary response. Also relevant here is the extent to which the approach to knowledge-building is inclusive of sources other than natural science so as to include other disciplines, traditional ecological knowledge and local user or community knowledge. An inclusive approach suggests that the knowledge is not elitist, but rather canvasses all available sources. This could be very significant in the eyes of participating actors. Also useful to ascertain here is to what extent a government initiative draws on non-governmental research and knowledge capabilities (e.g., universities, private sector and NGOs). Is there an epistemic community behind the decision? Are government experts networking with non-governmental experts? Are the decision makers drawing knowledge directly from stakeholders (i.e., value of consultation but also the lobbying this entails) or hiring knowledge (consultants) or are they simply using in-house expertise? Is there an opportunity for epistemic communities and the public at large to question or peer review the science made available?

From a pragmatic perspective, it is important to ask how knowledge is made available to the decision-maker. It is difficult for decision-makers to deal with scientific uncertainty, information shrouded in jargon, or information presented in an unusable manner. Scientists may be specialists, but managers are generalists. Also, the relationship between science and management is not an easy one, as science may not always produce the definitive answers that administrators and their political masters seek. In turn, scientists are fiercely independent and tend to object to administrative controls.

Policy

What should be considered here is a policy decision and the policy framework within which it occurs. There are various policy factors that may facilitate or constrain ICOM both at the development stage (policy-making process) and in the substantive content (the decision). Miles defined policy as “a purposive course of action,” suggesting a rationalised decision in view of achieving stated ends.¹⁷ Policy must convey its purpose and the action foreseen sufficiently clearly as not to leave ambiguity of expectations. Clarity, consistency, predictability and equity are important criteria. The content must withstand at least a *prima facie* probing analysis. There should be benefits ensuing which are justified by the costs (socio-economic, ecosystemic) to be incurred. There is no objective standard. What is important is that the decision is justifiable according to an identifiable set of values, interests or policy promises, and that those that decide are held accountable. Relevant questions to be posed should relate to the degree of politicization of a decision, the extent to which diversity is reflected, the extent of integration or sectoralization in the circumstances, targets of the decision, the relationship of the policy decision to other

¹⁷ Edward L. Miles, “Concepts, Approaches and Applications in Sea Use Planning and Management,” 20 *Ocean Development and International Law Journal* 213-238 (1989).

policies (coordination of left and right hands; degree of complementarity or conflict), resource commitments, intended effect (e.g., allocation, distribution, organization, etc.) and accountability.

The policy rationalization process is influenced by values or beliefs held by the decision-maker and interests that are actively pursued. In assessing ICOM initiatives it is useful to enquire whose interests are driving the policy development process and in whose interests is the final decision made. This is relevant because the integrated approach implies an inclusive approach, and the policy decision made is necessarily rationalised on the basis of the diversity of interests. A policy decision that is particular rather than general can be expected to be more exclusive than inclusive in the interests captured. Thus where the context is characterised by diversity, the interests of diversity cannot be served and integration cannot be achieved through an exclusive approach. This is not to say that sectorally-based or oriented decisions are necessarily problematic, but rather that decisions that purport to be integrated ought to be looked at differently from those that are not. Therefore what are the underlying values and interests, whether a particular initiative is inclusive or exclusive, and to what extent, should be pertinent questions.

Efficiency should be a criterion to determine the performance of a policy decision.¹⁸ Policy-making in a federal system necessarily occurs at different levels of government as well as in different sectors, frequently in a parallel manner. When policy-making at different levels occurs without cross-referencing, a lack of efficiency and possibly also a lack of effectiveness can be expected. This is so because resources, especially limited resources (whether human or material), cannot be said to be used efficiently if duplication occurs and objectives are reached at a higher overall cost, irrespective of whether duplication occurs as a matter of right, principle or simple competition.

ICOM policy-making occurs within a larger governance and socio-economic framework. Accordingly, it is to be expected that there will be a relationship with other policy-making processes, frequently elbowing for attention and resources, at times complementing and at other times competing with other processes. The ICOM process can be negatively or positively influenced by extraneous factors, and likewise affect other processes. The presence and degree of influence or spill-over of other decision-making processes, such as trade and energy, can be vital to explain why a particular ICOM process is driven by shipping and/or offshore development. This poses a challenge for the integrated approach as it may well be that it is the consequence, rather than the cause of a coastal and ocean management challenge that may have to be addressed, and in itself this poses limits to integration.

¹⁸ Miles, “Future Challenges in Ocean Management,” note above, at 599.

Finally, the policy-making process occurs in context and rarely is this static. Thus fisheries management in Canada in the 1990s faced massive stock collapses, loss of livelihoods and displacement of coastal communities, and the ensuing decisions had to reflect the ecological, political, economic and social crises. Coastal and marine resource allocation must take into consideration the context of aboriginal rights. In the 1990s the privatization drive resulted in significant change in the institutional framework for shipping, and ostensibly what was supposed to result in integration of ocean management functions resulted in fragmentation of maritime administration functions. Contextual pressures significantly influenced policy-making. The lessons of the 1990s and into this millennium in Canada suggest that ICOM prospects may be significantly shaped by context before they are even initiated.

Legal framework

There are various legal factors that influence ICOM in Canada, several of which draw on Canada's federal character, the consequent division of powers in a historical context, and its international obligations. The legal factors considered are proposed as related classes of issues, namely property and jurisdiction, aboriginal rights, statutory schemes (federal and provincial) and applicable international law.

Federal and provincial property and jurisdiction

The first factor concerns Canadian maritime zones and related authority that can be exercised over ocean areas in the international law of the sea. This is a facilitating factor for ICOM because it produces a certain degree of certainty for Canada's maritime claims in the eyes of the international community. Although Canada is not yet a party to the *UN Convention on the Law of the Sea (UN Convention)* it has in effect legislated through Part I of the *Oceans Act* and earlier statutes almost all maritime zone entitlements under that treaty.¹⁹ Canada has an extensive system of straight baselines in the Atlantic, Arctic and Pacific oceans that captures extensive inshore waters as Canadian territory.²⁰ In the past, Canada also claimed many bays on all three oceans as historic bays, mostly without protest from other maritime powers.²¹ Modern maritime zone claims include a 12M territorial sea, a 24M contiguous zone, a 200M exclusive economic

¹⁹ *The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index* (New York: United Nations, 1983), 1-157.

²⁰ The *Oceans Act*, note above, s. 5-6, provides for straight baseline delineation by regulation: *Territorial Sea Geographical Coordinates Order*, C.R.C., c. 1550; *Territorial Sea Geographical Coordinates (Area 7) Order*, S.O.R./85-872.

²¹ Opinion expressed by the Legal Bureau, Department of External Affairs (at the time), reproduced in 12 *Canadian Yearbook of International Law* 277-279 (1974). In the past the United States objected to Canada's internal water claims in the Bay of Fundy and Arctic archipelago.

zone (EEZ) and a continental shelf.²² Although the full seaward limits of the first three have been determined, the outer limits of the continental shelf have not yet been determined. Given the broad margin character of Canada's potential claim at least in the Atlantic and Arctic oceans, the lack of a seaward limit at this time can be expected to constrain the full exercise of continental shelf rights and responsibilities in this maritime zone possibly both in relation to non-living resources and sedentary species.

The extent of Canadian authority over the various maritime zones is highly variable. Internal waters and the territorial sea are subject to sovereignty, in effect entailing the exercise of the totality of jurisdictions and powers that may be exercised on land, subject to the international right of innocent passage as a constraint. The contiguous zone permits the exercise of enforcement jurisdiction for customs, fiscal, immigration and sanitary purposes. For instance, Canada has the right to turn away or apprehend ships that may carry illegal immigrants. In reality this power is constrained by humanitarian considerations and the frequent lack of seaworthiness of rogue ships.²³ The EEZ provides sovereign rights over natural resources, exclusive rights over other economic activities and jurisdiction for environment, marine science, artificial islands and installations purposes. The overall constraint in this maritime zone relates to the specificity of the existing rights. In practice, however, Canada has provided for the application of federal and provincial laws over offshore activities.²⁴ The continental shelf within 200M (i.e., co-extensively with the EEZ) poses no special issues. It is outside 200M and up to as yet the undefined outer limits of the continental margin that Canada has a potential constraint to its sovereign rights over natural resources (including sedentary species). In this "outer" continental shelf area, offshore mineral activities will potentially be subject to an international tax payable to the International Seabed Authority.²⁵ At the same time, the exercise of rights over sedentary species (the only living resources tied to the continental shelf regime) may enable Canada to protect the seabed and subsoil habitats of such species outside the 200M limit.²⁶

²² *Oceans Act*, note above, ss. 4, 10, 13 and 17.

²³ "Smuggling Chinese Immigrants into Canada called Big Business," CNN.Com, 13 January 2000, <http://www.cnn.com/2000/WORLD/americas/01/13/canada.smuggling/> (Accessed 28 October 2002).

²⁴ *Oceans Act*, note above, s. 21. The only such extension of provincial law under this act is with reference to the Confederation Bridge Area Provincial (P.E.I.) Law Application Regulations, S.O.R./97-375. See also *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c. 3, s. 152 extends the application of provincial health, safety and labour law to the offshore; *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*, S.C. 1988, c.28, s. 157 makes a similar extension.

²⁵ *UN Convention*, note above, Article 86.

²⁶ *Ibid.*, s. 77(4). In the EEZ the right and duty to conserve is stated in article 61. Although there is not a similar stipulation in relation to the continental shelf, the exclusive right

At a sub-national level, there is an ongoing constraint in terms of provincial claims to maritime property rights as distinct from federal prerogatives over jurisdiction. For the most part, the federal government (as “Canada”) exercises the rights and duties of a coastal state in the law of the sea.²⁷ Maritime areas are generally deemed to be “extra-territorial” and therefore prima facie are subject to this national level of authority. However, this has not discouraged some provinces from testing their claims over various maritime areas. British Columbia does not enjoy a territorial sea but has property over the waters, seabed and subsoil of the area enclosed between Vancouver Island and the mainland.²⁸ Newfoundland probably has a territorial sea of three nautical miles, but not a continental shelf.²⁹ New Brunswick and Nova Scotia have not judicially tested their longstanding and pre-confederation claims in the Bay of Fundy.³⁰ Nova Scotia has on occasion reminded the federal government that Sable Island is part of the province. Nova Scotia has strong grounds for a legal claim on historic grounds to maritime areas off its Atlantic shores.³¹ On different occasions in the past, provincial courts have exercised jurisdiction over causes of actions in bays.³²

to explore and exploit sedentary species outside 200M in s. 77(4) should be read against Article 193, which provides that state parties to the *UN Convention* have a right to develop their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

²⁷ *Oceans Act*, note above, s. 7, 8, 15 and 19.

²⁸ *Reference Re Ownership of Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792; *Reference Re Ownership of the Bed of the Strait of Georgia and Related Areas*, [1984] 1 S.C.R. 388.

²⁹ *Reference Re Mineral and Other Natural Resources of the Continental Shelf* (1983), 145 D.L.R. (3d) 9 (Nfld. C.A.); *Reference Re Seabed and Subsoil of the Continental Shelf Offshore Newfoundland*, [1984] 1 S.C.R. 86.

³⁰ For a discussion of potential entitlements of New Brunswick and Nova Scotia, see: G. V. La Forest, “Canadian Inland Waters of the Atlantic Provinces and the Bay of Fundy Incident,” 1 *Canadian Yearbook of International Law* 149-171 (1963); G.V. La Forest, “The Delimitation of National Territory: Re Dominion Coal Company and County of Cape Breton,” 2 *Canadian Yearbook of International Law* 233-244 (1964); E. C. Foley, “Nova Scotia’s Case for Coastal and Offshore Resources,” 13 *Ottawa Law Review* 281-308 (1982).

³¹ Foley, *ibid.* at 308. For the purposes of offshore development “Nova Scotia lands” include “the land mass of Nova Scotia including Sable Island, and includes the seabed and subsoil off the shore of the land mass of Nova Scotia, the seabed and subsoil of the Continental shelf and slope and the seabed and subsoil seaward from the Continental shelf and slope to the limit of exploitability. *Petroleum Resources Act*, R.S., c. 342, s. 7.

³² *Re Bay of Fundy, R. v. Burt* (1832), 5 M.P.R. 112 (N.B.C.A.); *re Conception Bay and*

The constitutional law of Canada and case law do not effectively settle property and jurisdictional issues. The *Constitution Act, 1867* allocated extra-territorial matters, fisheries, navigation and shipping to the federal government, whereas property and civil rights were allocated to the provincial governments.³³ At the same time, the property boundaries of Nova Scotia and New Brunswick were protected as at the time of confederation, suggesting that whatever these provinces brought into confederation by way of property is still protected today.³⁴

In practice, although provincial perceptions have tended to constrain federal initiatives in ICOM, both governments have approached their differences in a pragmatic and functional approach and situation by situation. This has enabled ocean development to proceed while provincial claims remained unaffected. Two examples of this concern offshore development and aquaculture. Following the *Newfoundland Offshore Reference*,³⁵ the federal, Newfoundland and Nova Scotia governments entered into political offshore accords which were legislated concurrently at both federal and provincial levels.³⁶ In aquaculture, the federal government concluded agreements with several provincial governments that in effect recognize the provinces' lead role in the licencing and management of this marine use.³⁷

other bays in Newfoundland, *Direct United States Cable Co. v. Anglo-American Co.* (1877), 2 App. Cas. 394 (P.C.); re Bay of Chaleurs, *Mowat v. McPhee* (1880), 5. S.C.R. 66; re Mahone Bay, N.S., *King v. Conrad* (1938), 12 M.P.R. 588 (N.S.C.A.). A case to the contrary in relation to Spanish Bay, Cape Breton, was *Re Dominion Coal Co. and County of Cape Breton* (1963), 40 D.L.R. (2d) 593 (N.S.C.A.).

³³ (U.K.), 30 & 31 Vict., c. 3, ss. 91 (federal powers) and 92 (provincial powers).

³⁴ *Ibid.*, s. 33.

³⁵ *Reference re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland* (1984), 5 D.L.R. (4th) 385 (S.C.C.).

³⁶ *Canada-Newfoundland Atlantic Accord Implementation (Newfoundland) Act*, R.S.N. 1990, c. C-2; *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation (Nova Scotia) Act*, S.N.S. 1987, c. 3.

³⁷ See the Federal Aquaculture Development Strategy, http://ocad-bcda.gc.ca/eaqu_e.pdf (accessed 28 October 2002). For instance Nova Scotia and DFO have had a series of aquaculture development agreements since March 1986. The current agreement was renewed recently. See "Thibault and Fage Renew Canada/Nova Scotia Memorandum of Understanding on Aquaculture Development," DFO News Release, 18 June 2002, www.ncv.dfo.ca/media/newsreel/2002 (Accessed 28 October 2002).

Aboriginal government

As seen earlier, aboriginal rights are increasingly finding constitutional protection. While on the one hand these rights can be seen as a type of encumbrance on the Crown, their full extent remains uncertain. One view is that such rights attach to Crown title wherever that title may be asserted.³⁸ Also unclear is the potential outcome of differences between the federal government's regulatory conservation authority and aboriginal groups that claim a right to manage a resource as part of their aboriginal rights. However, an indication as to the disposition of the federal government to address the right of aboriginal peoples to share benefits in non-living, in addition to living resources can be found in the recent agreement between the Department of Indian and Northern Development and Quebec's Inuit.³⁹

Statutory schemes (federal and provincial)

Federal and provincial statutory schemes may also facilitate or constrain ICOM. The most important federal statute in support of ICOM is clearly the *Oceans Act*. Divided into three parts, this act defines the maritime zones of Canada, provides for integrated management and allocates powers, duties and functions to DFO. This act provides a general authority to lead and facilitate ICOM to the Department of Fisheries and Oceans. The act is a type of "constitution" for Canada's ocean space and as a result much of it is declaratory, organizational and norm-setting at a level of generality.

Despite its comprehensiveness, the act does not cover all relevant factors for ICOM. In fact what is *not* covered by the act is arguably as important as what is covered. A significant potential constraint to integrated coastal management is the exclusion of rivers and lakes, and by implication watersheds.⁴⁰ The full extent of application to terrestrial areas is also questionable,

³⁸ Bernd Christmas, Chief Executive Officer, Membertou, "Overview of the Legal Challenges Facing Land and Maritime Claims of the Mi'Kmaq," a public lecture delivered in the Marine and Environmental Law Programme Lecture Series, Dalhousie Law School, 1 November 2001.

³⁹ Signed on 24 October 2002, this agreement is the first such agreement in Canada. The Nunavik Inuit will be sharing royalties from any oil, gas and precious stone discoveries, as well as proceeds from fisheries development. The agreement also gives the Inuit 80% of the Nunavik islands and interconnecting waters in the Hudson Bay, Hudson Strait and Ungava Bay, all in all amounting to 250,000 square kilometres. "Inuit Royalties Deal a First for Ottawa: Quebec Natives to Share Proceeds of Offshore resources," *National Post*, 26 October 2002.

⁴⁰ *Oceans Act*, note above, s. 28.

despite a reference to integrated management plans for “all activities or measures in or affecting estuaries, coastal waters and marine waters (*emphasis added*).”⁴¹ For integrated coastal management purposes, this is an obvious contradiction in the legislation. Federal initiatives under this act would have to find creative ways how to apply integrated management plans to the “land” component of the land-sea interface. The application of such initiatives to rivers and lakes would have to be orchestrated under the authority of other legislation.⁴²

The act is primarily framework legislation and to date contains no new subsidiary legislation other than what was imported from the statutes that it now supersedes. Stakeholders have perceived this absence of new regulation as a weakness and the Standing Committee has in fact recommended the adoption of regulations.⁴³

Beyond the *Oceans Act* and federal and provincial environmental protection acts lies a myriad of federal and provincial sectoral legislation. This legislation establishes mandates for coasts and oceans related concerns that interact with the Department of Fisheries and Oceans’ lead role in ICOM. Occasionally, there is at least implicit, if not explicit conflict or lack of complementarity between sectorally allocated powers and the integrationist role of the lead agency. This has the potential of constraining ICOM. For instance, the Department of Fisheries and Oceans, the Department of the Environment (Canadian Wildlife Service) and Parks Agency have mandates for the establishment of protected areas, although under different names.⁴⁴ The Department of Transport is the maritime administration of Canada, but the Canadian Coast Guard (CCG) is part of the Department of Fisheries and Oceans.⁴⁵ Culturally and functionally (because of the shipping and navigation concerns), the CCG is naturally closer to the Department of Transport (which still hosts marine institutions such as the Marine Safety and Ports and

⁴¹ Ibid., s. 31. Through text (“for greater certainty”) and its location as the first section of Part II In s. 28, the legislator has chosen to remove any uncertainty regarding the exclusion of rivers and lakes.

⁴² For instance, specific matters such as water quality, vessel-source pollution and illegal fishing matters in inland waters could be addressed through the *Canada Water Act*, R.S.C. 1985, c. C-11, *Canadian Environment Protection Act (CEPA)*, 1999, S.C. 1999, c.33, *Fisheries Act*, R.S.C. 1985, c. F-14, and *Canada Shipping Act*, R.S.C. 1985, c. S-9.

⁴³ Recommendation 1, *SCFO Fourth Report*, note above.

⁴⁴ DFO: *Oceans Act*, note above, s. 35; Canadian Wildlife Service: *Canada Wildlife Act*, R.S.C. 1985, c. W-9; Parks Agency: *National Parks Act*, R.S.C. 1985, c. N-14. The three institutions are cooperating to harmonize approaches.

⁴⁵ Prior to the *Oceans Act* the Canadian Coast Guard was part of the Department of Transport. The DFO is now responsible for the Coast Guard. *Oceans Act*, note above, s. 41.

Harbours) than to its current institutional home.⁴⁶ The Nova Scotia and Newfoundland offshore petroleum boards have separate federal and provincial statutory authority to grant offshore licences, set conditions for the conduct of exploration and development activities, and this can result in actual overlaps between offshore uses and other uses licenced or serviced, and protected areas established by other departments under other statutory authority. The shipping legislation does not fully apply to offshore activities.⁴⁷ Likewise, water quality criteria for discharges into the marine environment are different for offshore activities and shipping.

As a result, there are overlaps of statutory mandates between some statutes and the mandates performed by the bodies concerned and inconsistencies in regulatory standards for different users of the marine environment, even in the same area. These legislative factors can be expected to potentially constrain ICOM.

Interdepartmental conflict resolution mechanisms are not necessarily legislated. Interdepartmental overlaps in mandates and consequent turfing may be addressed through memoranda of agreement or joint committees designed to harmonize or dovetail efforts. For instance, the pursuit of overlapping mandates for the establishment of protected areas of the bodies referred to above has been addressed through such an instrument.⁴⁸

Applicable international law and policy

International law is increasingly playing a significant role in informing and guiding Canada's domestic legal system. Canada is party to numerous ICOM-relevant treaties and these are implemented through federal statutes.⁴⁹ Canada has also implemented treaties which it generally

⁴⁶ Aldo Chircop, Hugh Kindred, Phillip Saunders and David VanderZwaag, "Legislating for Integrated Marine Management: Canada's Proposed Oceans Act of 1996," 33 *Canadian Yearbook of International Law* 305-331 (1995), at 323.

⁴⁷ For instance important provisions on limitation of liability for maritime claims and oil pollution compensation respectively do not apply to floating platforms for non-living resource exploration and development and vessels undertaking on site exploration or exploitation of hydrocarbons. *Marine Liability Act*, S.C. 2001, c. 6, ss. 25 and 49.

⁴⁸ See *Working Together for Marine Protected Areas: A National Approach* (Ottawa: Minister of Public Works and Government Services Canada, 1998), <http://www.dfo-mpo.gc.ca/oceanscanada/newenglish/library/wtogether/wtogeth.html> (accessed 4 November 2002).

⁴⁹ For example the *CEPA*, note above, implements, among others, the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, 1989, <http://fletcher.tufts.edu/multi/texts/BH937.txt> (accessed on 30 October 2002); and the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 and 1996 Protocol (London Convention)*, <http://fletcher.tufts.edu/multi/texts/dumping.txt>

supports, but is not necessarily a formal party to.⁵⁰ There is also international customary law which applies in Canada without necessarily being legislated through a statutory scheme.⁵¹ The relevance of international law is the existence of international standards which Canadian courts have invoked in interpreting and applying law consistently with Canada's international obligations.⁵² The factor to be weighed here is the existence or otherwise of international law that should inform and guide a particular ICOM initiative and whether such initiative is consistent with or contrary to an international commitment.

Institutional framework

Institutional actors

There is a wide variety of institutional actors, both in terms of the mantle of authority they bear, the function they perform and the interests they represent. The principal concern here is with governmental actors. The range of governmental actors is extensive: cabinets, ministries, departments, agencies and inter-ministerial/departmental committees. Authoritative actors in Canada are located in federal, provincial and municipal⁵³ levels of government, aboriginal government, and in some cases of delegation (e.g., through boards or tribunals) or privatization, crown corporations and private sector bodies. Also relevant are parliamentary and provincial legislature committees which may have an indirect role to play, such as the Standing Committee for Fisheries and Oceans which conducts periodic reviews of the *Oceans Act* and its implementation. Another potentially significant player is the court of law, which by facilitating

(Accessed on 26 November 2001).

⁵⁰ The *UN Convention*, note above, is a case in point. The maritime zones in the *UN Convention* have been implemented in the *Oceans Act*, note above, although Canada is not yet a party.

⁵¹ For instance the international customary right of ships in distress has been applied by Canadian courts. "It is a well-recognized principle, supported by the jurisprudence as well as by the opinions of authors on international law, that a ship, compelled through stress of weather, duress or other unavoidable cause to put into a foreign port, is, on grounds of comity, exempt from liability to the penalties or forfeitures which, had she entered the port voluntarily, she would have incurred." *Cashin v. Canada*, [1935] Ex. C. R. 103.

⁵² This is the case in a wide variety of settings. See for instance; *Suresh v. Canada*, [2002] S.C.C. 1, File No.: 27790; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; *Baker v. Canada*, [1999] 2 S.C.R. 817.

⁵³ In Canada municipalities are creations of provincial governments. They have powers that are centrally relevant for integrated coastal management, such as the power to zone, standard-setting for construction, taxation of real estate and municipal waste management.

dispute settlement or clarifying the import of a particular law can have far-reaching influence on ICOM. Through the *Marshall* decision the Supreme Court of Canada has had a far-reaching impact on aboriginal rights in resource matters. Likewise, the Supreme Court's jurisprudence on Canadian maritime law has significantly curtailed a widespread practice of judicial application of provincial private law in a maritime setting.⁵⁴ A key question to be asked in relation to authoritative decision makers is who is driving, leading, facilitating or constraining an ICOM initiative, and why.

Authoritative actors have a legal mandate to perform, are subject to political and bureaucratic pressures, and can be targets for criticism or be perceived as sources of benefits. The manner through which they react to these pressures can significantly facilitate or constrain their ability to perform their mandates. For instance, significant criticism of the first version of the *Oceans Act* as a bill forced some reconsideration and re-introduction as an improved bill.⁵⁵ Similarly, the significant public criticism of the *Oceans Strategy* discussion paper probably led to its five-year "freeze" until the actual strategy was released in 2002.⁵⁶

Although not possessing authoritative decision-making power, non-governmental organizations may play important roles in screening decision-making in the interests of accountability, the projection of particular interests, in partnership with decision-makers, dissemination of information and public education. Organized communities, whether working through NGOs or through an incorporated body, may also share local authoritative decision-making in partnership with a level of government through co-management initiatives. The contributions of such organizations in shaping a particular ICOM initiative, peer reviewing it or in promoting accountability should be identified.

As institutional actors industry stakeholders act to influence, pressure or lobby authoritative decision makers in pursuit of particular interests. For instance when the federal government acted to privatize contingency planning response services to ships, over 30 objections were registered and in turn these led to the establishment of a federal commission to enquire into the basis of fees for such services.⁵⁷

Nature and clarity of ICOM mandates

⁵⁴ On this subject see "Chapter 3: Admiralty Jurisdiction," in Edgar Gold, Aldo Chircop and Hugh Kindred, *Canadian Maritime Law* (Toronto: Irwin Law, forthcoming in 2003).

⁵⁵ See for instance the commentary in Chircop et al., note above.

⁵⁶ Fisheries and Oceans Canada, *Toward Canada's Oceans Strategy: Discussion Paper* (Ottawa: Communications Directorate, 1997).

⁵⁷ Edgar Gold (Chair), John Gratwick, and Peter Yee, *Canadian Oil Spill Response Capability: An Investigation of the Proposed Fee Regime: Final Report* (Ottawa: Fisheries & Oceans Canada, 1996).

Controversial or unclear ICOM mandates can give rise to resistance or conflicting expectations between lead and other actors. Mandates can be expected to be either formal, in the sense of an authoritatively assigned power, or informal where in the absence of a specific allocation a power may be assumed or expected to be assumed by a concerned actor.

Perhaps the most important role belongs to the DFO, which is designated as the lead agency for ICOM in Canada. At the same time, the DFO has the power to assume non-designated responsibilities over any other ocean matter within federal jurisdiction that is not assigned to another minister.⁵⁸ It must be emphasized that this lead role is with reference to the oceans strategy, integrated planning and management and MPAs. Other departments have their own separate *de jure* lead roles in their respective sectors. Hence the recommendation of the Standing Committee that “the government affirm that the Minister for Fisheries and Oceans has the primary responsibility for all matters relating to the management of Canada’s oceans” could only be met with an inevitable government response: “[B]oth the Department of Fisheries and Oceans and the *Oceans Act* fully respect the existing mandates, responsibilities and authorities of other federal departments and agencies. This is important because nearly every federal department or agency has some level of responsibility related to Canada’s oceans, and therefore has a legitimate and necessary role to play in the future of oceans management.”⁵⁹

The DFO (through its minister) “shall lead and facilitate the development and implementation of a national strategy for the management of estuarine, coastal and marine ecosystems.”⁶⁰ This broad function in relation to ecosystems is accompanied by a complementary function with reference to different types of waters, i.e., “the development and implementation of plans for the integrated management of all activities or measures in or affecting estuaries, coastal waters and marine waters.”⁶¹ The dual role of leader and facilitator in both “strategizing” and “planning” is a significant combination of powers that enables the Department of Fisheries and Oceans to embark on its own initiatives and at the same time assist the initiatives of other departments.

The *Oceans Act* mandate does not provide DFO with a *carte blanche* for the exercise of its powers under the act. First, the powers are actually legal duties, meaning that lack of leadership or facilitation by DFO would be at odds with the act. The extent to which inaction is legally actionable or simply a matter of political accountability is unclear. The political undertone of inaction was well-captured by the Standing Committee in recommending that the Minister for Fisheries and Oceans “exercise his role as the minister with overall responsibility for

⁵⁸ *Oceans Act*, note above, s. 40.

⁵⁹ Recommendation 11, *SCFO Fourth Report*, supra.

⁶⁰ *Oceans Act*, note above, s. 29.

⁶¹ *Ibid.*, s. 31.

the management of Canada's oceans more proactively.”⁶²

Second, strategies and plans are required to be based on principles of sustainable development, integrated management and precaution.⁶³ The ability of these principles to facilitate or constrain ministerial activity depends on their definition. In a sense, although in general terms, sustainable development and precaution are defined.⁶⁴ Precaution also benefits from further development and application in other statutes and case law. Integration, on the other hand, is not defined in any manner and could be problematic in its application.⁶⁵ The absence or high flexibility of definitions is arguably useful for the federal government to launch initiatives that are guided only by general norms.

Third, a more significant constraint is the DFO's duty to cooperate with “other ministers, boards and agencies of the Government of Canada, with provincial and territorial governments and with affected aboriginal organizations, coastal communities and other persons and bodies, including those bodies established under land claims agreements.”⁶⁶ The duty here is arguably more than a duty to consult, and is probably a duty to “collaborate” in the exercise of powers of leadership and facilitation. The diversity of actors to be consulted necessarily involves a high degree of complexity in communications and interactions leading to decision-making. In fact, ICOM initiatives should also be screened to ascertain to what extent, if at all, do they address interdepartmental coordination and cooperation in view of a harmonized approach.

The extent to which mandates facilitate or constrain ICOM has also to be considered with reference to the institutional “heritage” of the body concerned. For instance a long-standing criticism of DFO has been the heavy emphasis on fisheries. Even following the coming into force of the *Oceans Act*, where DFO's mandate received explicit responsibilities and powers for “oceans,” the institutional fisheries stigma remained, while at the same time fisheries constituencies still lobby for a higher profile for fisheries interests.⁶⁷ It is suggested that in the

⁶² Recommendation 12, *SCFO Fourth Report*, supra.

⁶³ *Oceans Act*, note above, s. 30.

⁶⁴ “[S]ustainable development, that is, development that meets the needs of the present without compromising the ability of future generations to meet their own needs;” “the precautionary approach, that is, erring on the side of caution,” *ibid*.

⁶⁵ “[I]ntegrated management of activities in estuaries, coastal waters and marine waters that form part of Canada or in which Canada has sovereign rights under international law;” *ibid*.

⁶⁶ *Oceans Act*, note above, ss. 29 and 31.

⁶⁷ See recommendation three which advocates amendment of the *Oceans Act* “to include references to fishermen and fishermen's organizations in the sections of the act that require the Minister to consult.” This recommendation seems to have been arrived at after some pressure

eyes of non-fisheries stakeholders this stigma may constitute a constraint for ICOM initiatives as it might suggest bias. In this respect, as lead agency for oceans the DFO would need to create a delicate balance between, on the one hand the needs and demands of integrated and multi-sectoral management, and on the other the sectoral aspect of its mandate, i.e., fisheries. Failure to create this balance could potentially create conflict of interest in the department's dual mandate (i.e., oceans/multi-sectoral leadership v. fisheries/sectoral leadership), and possibly undermine integrated management.

Institutional behaviour

The ICOM inquiry should also extend to the different types of behaviour discernible from relevant actors. There are those that are inclined towards cooperative or competitive behaviour or possibly non-involvement. Cooperation might result from normative expectations, such as the expectation of collaboration from the Minister of Fisheries and Oceans. Competition is likely the result of inter-governmental and bureaucratic turfing. Non-involvement may simply be passivity, possibly as a result of disinterest, perceptions of lack of relevance or simply lack of resources to commit.

The manner in which decisions are made is important in assessing institutional behaviour. The institutional culture is a message unto itself in terms of how meaningful overtures of cooperation might turn out to be. For instance, if there is a public expectation of consultation before an initiative is launched or decision made, when in fact that does not occur, resistance and non-compliance can be expected. The decision to proceed with a consensus based approach at the First ESSIM Forum Workshop should be perceived as a significant new way of doing business in the Maritimes, possibly resulting in better constituency reception of this initiative than others. At the same time, it has raised expectations in terms of how DFO should proceed in the future.

It is suggested that cooperation needs to be pursued and be seen to be pursued with an inclusive decision-making ethic in order to facilitate ICOM. As noted earlier, integration juxtaposes a diversity of interests, both vertically with reference to authoritative decision makers, and horizontally among stakeholders, that any package deal will necessitate a high degree of communication.

Participatory processes

from Area 19 Snow Crab Fishermen's Association. *SCFO Fourth Report*, supra.

Central to governance is a class of factors loosely referred to as participatory processes. They may be expressions of participatory rights and expectations and potentially play a very significant role in legitimising or constraining ICOM knowledge-building, decision-making, implementation and compliance. Aspiration for good governance is increasingly enhancing ways to facilitating stakeholder and public participation, beyond mere information and consultation. Federal and provincial environmental assessment legislation now provides for public hearings or other types of participative processes.⁶⁸ The intensity of these “participatory processes” is even more visible in relation to aboriginal communities, local communities and affected individuals who may demand inclusion as a matter of right.

The traditional protection of individual rights (including property rights) through principles of natural justice has now evolved into a more far-reaching requirement of procedural fairness in most administrative decision-making bodies.⁶⁹ In particular, there may be legitimate expectations that a particular procedure or process be followed because of the expectations arising from a statutory scheme, government representations or treaty membership, and ultimately the credibility of government.⁷⁰ In oceans and environmental contexts, this is particularly relevant with reference to the DFO’s duty to cooperate and the conduct of hearings in an environmental assessment process.

Integration, because of the implied diversity, necessarily suggests an inclusive approach. The quantity or quality and timeliness of the inclusion raises questions of equity, or fairness. Administrative decision-making which affects individuals or groups in a fundamental manner is bound to observe participatory entitlements as a matter of procedural fairness.⁷¹ Participatory rights have now become very important in the administrative state, and in an ICOM context where administrative decisions may grant or take away a licence to hunt or fish or pollute, issue, confirm or deny maritime documents, permit a reduction in goods and services provided by an

⁶⁸ E.g.: *Oceans Act*, note above, ss. 29 and 31 require the Minister to collaborate with governments, aboriginal communities, coastal communities and other persons. *Canadian Environmental Assessment Act*, 1992 S.C. , c. 37, ss. 16(1)(c) re comments of the public are a factor to be considered, 18(3) re consideration of public comments, 19(2) re public notice among several other public notice requirements, 34 and 35(3) concerning the convening of public hearings by a review panel; 55 et seq. Re access to information, and 58(1.1) re participant funding. Provincial statutes have similar provisions. For example Nova Scotia’s *Environment Act*, R.S.N.S., 1994-95, c. 1, s. 44 has a public consultation requirement

⁶⁹ See David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), especially 147-175 on the reach of procedural fairness rights.

⁷⁰ Ibid., 177-186. See also J.M. Evans et. al., *Administrative Law: Cases, Text and Materials* 4d (Toronto: Emond Montgomery, 1995), 129-147.

⁷¹ For case law sources and analysis on procedural fairness, see Evans et. al, *ibid*, 45-206.

ecosystem, or facilitate the urbanization of a coastline, among others, it is to be expected that those that benefit are likely to be accompanied by those that do not, or worse. It is difficult to envisage compliance if the inequity of a decision-making process provokes resistance and grievance, and in turn forces costly enforcement or conflict management. Consequently, it is a legitimate question to ask to what extent the policy-making process is equitable in the eyes of the decision maker and decision receiver at the same time.⁷² This might help explain in part the degree of cooperation or otherwise in an ICOM initiative.

There are various ways how a framework for participation may satisfy equity in the sense above: co-management, public hearings or consultations, discussion papers accompanied by workshops, etc. There is no limit to the possibilities, but the degree of contextualization of the process, the ultimate range and intensity of participation and the sense of satisfaction or non-objection of stakeholders should be expected to favour some possibilities more than others. The key question is whether there is good process in the circumstances. This is a relative test. An ICOM initiative should be screened for such processes.

Another pertinent matter is the extent to which an ICOM initiative provides for conflict avoidance and management. The diversity implied by the integrated approach and the consequent inclusive participation should be expected to provide an opportunity for competing interests to influence a decision. Truly inclusive participation may avoid many potential conflicts simply by ensuring access and exchange of information to avoid misunderstandings. However, there can be situations where differences grounded on values and entrenched interests could mature into open conflicts. An ICOM initiative should anticipate this and provide conflict management mechanisms to enable orderly resolution without derailing the initiative.

Resources

ICOM initiatives will entail costs. A development proposal may consume ecosystem goods and services. That proposal may also allocate benefits to some, and decrease benefits to others. There might be a cost for non-action, or a higher cost associated with one option more than with another. There could be opportunity costs. Government may need to appropriate funding in support of an initiative. Taxes may need to be levied to fund an initiative, or donations or other voluntary allocations made. In all these instances, costs are incurred because an ICOM initiative needs to be resourced. In successful ICOM initiatives, the original investment may be multiplied as a result of leveraging other resources. This could be evidence of buy-in or ownership by stakeholders who recognise the value of the initiative and commit to its continuity by allocating more resources. Indeed, this could be an indicator of sustainability. The inverse of this is when no resource commitments are made to an initiative, which in turn suggests lack of genuine commitment. The absence or insufficiency of resources may stultify an initiative. This could be an indicator of lack of sustainability.

⁷² Miles includes equity as a criterion for evaluation of national ocean management regimes. “Future Challenges in Ocean Management,” note above, at 599.

Evaluation

An ICOM initiative should also be screened to determine if its design includes a monitoring and evaluation process to enable it to measure progress or the lack thereof, and to adjust to lack of results, change and unforeseen circumstances.⁷³ As indicated earlier, an effective evaluation process needs to start with a reliable set of baselines, performance indicators, critical assumptions and clear objectives with targets to be achieved.

Results should be measured in terms of outputs (immediate products), outcomes (short to medium-term) and impacts (long-term). There should be indicators which are useful both quantitatively and qualitatively. It is suggested that ultimately ICOM should be aiming at effectiveness in terms of (a) behavioural change (actual or potential; incentives), (b) impact on the environment, economy, health, etc. There will be costs incurred to justify the results; accordingly, there should be the possibility of measuring the benefit against the cost, and this will indicate level of efficiency. As a matter of good governance, there should be transparency in the evaluation process. Ultimately, constituencies have to be satisfied with both process and results.

An ICOM initiative that does not carry an in-built quality assurance process cannot be usefully measured to determine success or otherwise.

Assessing specific ICOM initiatives

At this point the discussion in this paper moves from the theoretical framework to specific integrated management initiatives in Canada. How have the factors presented above facilitated or constrained specific federal ICOM initiatives in Canada?

Canada's Oceans Strategy: Our Oceans, Our Future

The Canadian Federal Government released the long-awaited *Canada's Oceans Strategy* (*Oceans Strategy*) in mid-summer 2002,⁷⁴ five years after the release of the ocean's strategy discussion paper.⁷⁵ The *Oceans Strategy* constitutes the policy framework for Canada's vision

⁷³ Biliiana Cicin-Sain and Robert W. Knecht, *Integrated Coastal and Ocean Management: Concepts and Practices* (Washington, D.C.: Island Press, 1998), 241-248.

⁷⁴ *Oceans Strategy*, *ibid.* The release of the *Oceans Strategy* was accompanied by a second document: *Policy and Operational Framework for Integrated Management of Estuarine, Coastal and Marine Environments in Canada* (Ottawa: Fisheries and Oceans Canada, 2002).

⁷⁵ *Toward Canada's Oceans Strategy: Discussion Paper* (Ottawa: DFO, Communications Directorate, 1997).

for the management of its ocean space and is likely to be second in importance only to the *Oceans Act* for ICOM in Canada. The strategy goes to some length to assert the importance of ocean governance, specifically in terms of inter and intra-governmental collaboration, shared responsibility and an inclusive approach to decision-making. Because of its novelty, this instrument can only be assessed with reference to the process that generated it and the actual content.

A reading of the *Oceans Strategy* and the communication documents surrounding its release in July 2002, would lead the public to assume that the interest in and preparatory work for ICOM in Canada began only in the mid-1990s. There is no reference at all to the significant level of cooperative effort that was undertaken from the late 1980s through the early 1990s under an interdepartmental federal initiative known as Marine Environmental Quality (MEQ).

To understand the genesis of the MEQ one needs to refer to the 1987 *Oceans Policy for Canada*, which recognized that many federal agencies share the responsibility for and must cooperate in the maintenance and enhancement of the quality and sustainability of the marine environment. In support of this need, an Interdepartmental Committee on Oceans (ICO) was established to coordinate and guide marine programs and policies at the federal level.⁷⁶ The ICO recognized that coordination at the federal level would be essential and that an overarching framework for marine environmental quality would be necessary. Thus in 1989, the ICO established a Director-General level sub-committee to oversee the preparation of a federal MEQ framework and action plan. A working group of this DG Sub-committee, co-chaired by Environment Canada-Atlantic Region and DFO-Ottawa and composed of federal departments and agencies with a stake in the marine environment, was established to lead this process.

In 1992, 17 federal Deputy Ministers/Presidents endorsed a document entitled “Framework for the Management of Marine Environmental Quality within the Federal Government.”⁷⁷ Following this endorsement, the ICO Sub-committee further directed the Working Group to prepare a federal MEQ Action Plan that would identify interdepartmental activities related to the marine environment and that would provide for the overall coordination of related policies and programs of the federal government. Once completed, a national MEQ framework and action plan would be prepared, as a cooperative effort involving the provinces, territories, First Nations, industry, universities and the public.

The federal “Framework” and MEQ Action Plan set out a strategy for the management of marine environmental quality in Canada.⁷⁸ It consists of an overall objective,⁷⁹ a set of guiding

⁷⁶ *Oceans Policy for Canada*, note above, at 12.

⁷⁷ Marine Environmental Quality Working Group of the Interdepartmental Committee on Oceans, “Framework for the Management of Marine Environmental Quality within the Federal Government,” (Ottawa, 1992).

⁷⁸ Marine Environmental Quality Working Group of the Interdepartmental Committee on

principles⁸⁰ and a series of specific goals and related actions.⁸¹ The MEQ Working Group stayed active through early 1995 until interdepartmental turfing over proposed transfer of resources reached levels that all but eliminated discussion, let alone continuance of any collaborative arrangements between EC and DFO. The MEQ initiative was relegated to oblivion and the proposed national MEQ framework and action plan were never pursued.

Even a cursory examination of the MEQ initiative's principles, objectives, goals and proposed actions demonstrate that much of the current ICOM thinking as espoused by DFO was anticipated. However, the *Oceans Strategy* provides no acknowledgment of this important earlier

Oceans, "Federal Framework and Action Plan for Marine Environmental Quality", (Dartmouth and Ottawa, 1994).

⁷⁹ To enable Canada to effectively maintain and enhance marine environmental quality. This will in turn allow for the sustainable development of Canada's marine resources and for the enjoyment, use and good health of present and future generations and for the restoration, conservation, protection and enhancement of natural and cultural marine areas.

⁸⁰ The quality of the marine environment is of local, regional, national and global importance and is essential for the sustainable development of marine resources; the federal government has a national leadership role for the overall conservation and protection of Canada's marine environment, as well as specific statutory responsibilities; the stewardship of the marine environment is the shared responsibility of the international community, federal and provincial governments, First Nations, and other stakeholders. Crucial to the achievement of the framework's objective are consultation and collaboration among all stakeholders; the maintenance of a healthy marine environment, the support of environmentally-sound economic activity, and the provision of environmental services are priorities of the federal government; scientific understanding of the marine environment is essential for sound management of marine environmental quality; and sound decisions by all levels of Canadian society are based on the availability of timely information on issues relevant to the quality of the marine environment.

⁸¹ The federal government has identified nine major goals related to the management of marine environmental quality in Canada: honour Canada's international commitments and obligations for the management of oceans; maintain and enhance the marine environment through cooperation at national and regional levels with other levels of government, First Nations and others; fulfill the federal government's statutory and regulatory responsibilities in relation to the quality of the marine environment; integrate environmental, social and economic objectives in marine areas to meet sustainable development; promote safe and environmentally sound human activity in marine areas; establish and manage a comprehensive network of marine conservation areas, migratory bird sanctuaries and other protected areas; protect human health; improve scientific knowledge and understanding of the marine environment and maintain appropriate Canadian research, technical and managerial expertise to address marine issues; and communicate the benefits and importance of a healthy marine environment.

cooperative work before DFO was designated lead federal department for coasts and oceans by the *Oceans Act*. Two important observations have to be offered in this regard: first, there is loss of corporate memory, thus suggesting inefficiency and possibly leading to the proverbial “re-invention of the wheel;” the second is lack of acknowledgment of other institutions’ contributions, which may not bode well for future interdepartmental cooperation which will be so essential to ICOM.

Trigger

The initiative of DFO to develop a national oceans strategy is a responsibility conferred on this department by the *Oceans Act*.⁸² Accordingly, this particular initiative cannot be said to have been triggered by an event, but rather constitutes the fulfilment of a legal mandate. Nor can it be said, in the view of these authors, that any particular crisis triggered the federal government to exercise its own mandate. However, it can be said that the eventual release and content were influenced by ongoing public pressure and perceptions of appropriate political timing. The release of the *Oceans Strategy* on the eve of the impending Rio + 10 UN conference in Johannesburg, South Africa, is no coincidence, and suggests an opportune forum to showcase Canadian oceans expertise.

Problems and baselines

The legal mandate provided to DFO is with reference to a national strategy for the management of Canadian estuarine, coastal and marine ecosystems. Because of its generality as a management framework at a national scale, the strategy does not, and could not, purport to address in depth any one problem or class of problems. Rather, it provides a framework to address any coastal and ocean problem or issue in existence or that might arise through integrated management plans, which are also mandated under the *Oceans Act*.

Consequently, the *Oceans Strategy* does not identify any baselines, and could not possibly do so. This will necessarily have to be addressed at the level of integrated management plans. At the same time however, the federal government has indicated in the *Oceans Strategy* that evaluation will be based on identified performance indicators, possibly to enable results-based management. Results-based management requires the identification of objectives in the form of outputs, outcomes and impacts (change over the short, medium and long-term), the achievement of which would be measured against performance indicators, and against a situation or conditions at a particular moment in time (physical and temporal reference points).

It is clear that the overall performance of the strategy will be difficult to assess without identified baselines, unless the performance of individual integrated management plans and MPAs established under the impetus of the strategy will be deemed to constitute the performance

⁸² *Oceans Act*, note above, s. 29.

of the strategy itself.

Management area

The *Oceans Strategy* addresses management area concerns at various levels. On a macro policy level, the strategy applies to all Canadian coastal and marine environments within national jurisdiction. Under certain conditions, it also purports to apply to areas outside national jurisdiction. On an operational level, the strategy provides for the identification of two types of management areas: (1) large marine ecosystem (large ocean management area, or LOMA); (b) coastal management area. Both would be defined in ecosystemic terms and the coastal management area would be related to the larger ocean management area.

The strategy emphasizes that the ecosystemic approach may well produce management areas that cut across different jurisdictional areas. What the strategy does not anticipate at this stage, but should be anticipated in integrated management plans, is that ecosystemic “boundaries” are not necessarily permanent, may vary in the case of overlapping ecosystems, and may fluctuate over time. This seems to have been anticipated in the case of the Southeast Marine Management Plan in Australia.⁸³ In effect, the conscious decision to steer away from formalistic jurisdictional boundaries for management areas signifies the arrival of a functionalist approach to ocean zoning. There are merits in this approach, but it will live side-by-side, rather than displace zoning for sectoral purposes, such as offshore oil and gas exploration, development and production licenses. How the two types of zoning, the first for integrated management purposes and the second for specific sectoral purposes, interrelate remains to be seen.

There may be limitations to this approach to management area definition. The strategy is careful to stipulate an ecosystemic approach or an ecosystem-based approach, and not an ecosystem management approach. This is not necessarily a problem-oriented approach, and in fact other than the need to identify priorities, there is no hint in the strategy that ICOM in Canada will be problem-oriented. The advantage of a problem-oriented approach is that the ecosystemic definition of the management area would be more directly related to the area of influence of the problem (which might cut across different systems). What should logically result from the approach in the strategy is that generalised ecosystems will be identified and then problems therein will be targeted for planning and management action, and not the other way round.

Knowledge base

⁸³ For an overview of this emerging plan see Veronica Sakell, “Operationalizing Integrated Coastal and Oceans Management in Australia: The Challenges,” presented at The Australian/Canadian Oceans Research Network (ACORN): Phase Two, 31 May-2 June 2002, Canberra, Australia.

The *Oceans Strategy* is purportedly a knowledge-based instrument drawing from national and international experience in ocean management. Knowledge is understood as solid multidisciplinary science subject to peer review. This heavy emphasis on marine science is accompanied by user knowledge (industry, fisherfolk, local communities) and the traditional ecological knowledge of aboriginal communities.⁸⁴ Perhaps this is where the oceans strategy misses the point on integration, in terms of the need for a better understanding of the relationship between communities/users and the marine environment. The understanding of human behaviour in relation to complex systems will require more than marine science. A notable under-emphasis is the role of academic and research institutions operating outside the governmental framework. This suggests that the traditional uneasiness of civil servants with the academic establishment continues and defeats the expressed intent on integrating knowledge. Moreover, there seems to be an implicit assumption that governmental bodies in Canada have the necessary knowledge and expertise to undertake the complex integration required in ICOM. Government would provide capacity to communities and to the international community, but little attention seems to be paid to the need to build capacity within the various levels of government in Canada.

On the plus side, there is an important commitment in the *Oceans Strategy* to the dissemination of knowledge and access to information by stakeholders and participants in integrated management plans. This will be essential to levelling the playing field among the various actors and facilitate informed and meaningful participation.

Policy factors: decision-making process and content

As noted earlier, the discussion paper that initiated the process leading to the release of the *Oceans Strategy* was first distributed in 1997. The federal government undertook hearings across the country and invited public and stakeholder feedback. There were many critical reactions which reflected the great diversity among ocean interests in the country and the high expectations on the federal government on this initiative. A major weakness at that time and until the actual release of the *Oceans Strategy* was that there was no clearly stated integrated national ocean policy in the country. As a result, the discussion paper was perceived as identifying potential issues that could be addressed in an oceans management strategy in the absence of well-defined objectives. This major weakness has now been addressed: the *Oceans Strategy* is the integrated national ocean policy of Canada.

There was no public release of a sequel to the discussion paper and before the *Oceans Strategy*. The re-thinking occurred within the federal government. In this interim period the initiative for regional integrated management planning was well under way and it was in fact thought that the learning by doing approach at the regional level would eventually lead to the development of a national strategy (bottom-up approach). This period also saw three successive ministers for Fisheries and Oceans and the emergence of several issues that hijacked the DFO's attention (e.g., *Marshall* decision and the Burnt Church crisis in New Brunswick). By 2002, the

⁸⁴ *Oceans Strategy*, note above, at 12-13.

federal decision to internally develop the strategy and release it to the public was effectively made without further public consultation. To remedy this shortfall in follow-up public consultations, the strategy is very careful in advocating an inclusive approach to integrated management decision-making.

On the policy content side, the fundamental goal of the strategy is “to ensure healthy, safe and prosperous oceans for the benefit of current and future generations of Canadians.”⁸⁵ This lofty goal is supported by three major objectives in terms of (1) marine environment protection, (2) promotion of sustainable economic opportunities, and (3) the exercise of international leadership.⁸⁶ The pursuit of the goal and objectives is advanced as a principled approach.⁸⁷ The principles advanced are drawn from the *Oceans Act*, namely sustainable development, integrated management and precaution. Although these fall short of the full range of principles stated in the *Rio Declaration on Environment and Development*, several other principles in the latter are identified a role in the strategy.⁸⁸ Thus, ecosystem-based approaches, indigenous knowledge and coastal communities have a place and role in the strategy.

Sustainable development is used more as a buzzword than a principle which can have truly operational significance. Nothing new is offered in relation to precaution, which is advanced both as principle and approach. However, of considerable significance is the federal government’s commitment to the “wide application of the precautionary approach to the conservation, management and exploitation of marine resources in order to protect these resources and preserve the marine environment,” the promotion of an ecosystem-based approach to management, application of conservation measures and establishment of MPAs, investing in knowledge-building and maintaining ecosystem integrity.⁸⁹ The *Oceans Strategy* falls short of stipulating more widespread use of environmental impact assessment under federal and provincial legislation as a planning tool before development or resource allocation decisions are made. It thus remains to be seen to what extent precaution will be widely applied with respect to the numerous fisheries of Canada, especially since resource management tends to be on a stock basis. Ecosystem science is still in its infancy and virtually every fishery is subject to intense political pressure.

⁸⁵ *Oceans Strategy*, note above, at 10.

⁸⁶ *Ibid.*, at 12-18.

⁸⁷ *Ibid.*, 10-12.

⁸⁸ E.g., the role of coastal communities and aboriginal peoples and their knowledge, *Rio Declaration on Environment and Development*, 1992, <http://www.fletcher.tufts.edu/multi/texts/RIO-DECL.txt> (accessed 5 November 2002).

⁸⁹ *Oceans Strategy*, at 11-12.

Much of the *Oceans Strategy* and the accompanying *Policy and Operational Framework* focusses on integration and the integrated approach, and not surprisingly so given the contextual complexity of ICOM in Canada. Integration is defined as a “continuous process through which decision-making is made,”⁹⁰ “a commitment to planning and managing human activities in a comprehensive manner while considering all factors ...” and that it includes other principles and concepts such as (1) holistic knowledge, information sharing, communication and education, (2) inclusive and collaborative structures and processes, (3) flexible and adaptive management as knowledge improves and in response to uncertainty, and (4) planning on the basis of a combined approach to natural and economic systems.⁹¹ There seem to be three major dimensions in its application, namely in relation to multiple ocean use planning, the management of the relationship between human uses and the environment (ecosystems), and the design and implementation of institutional responses. There seems to be a “conflict” bias in this approach to integration, in the sense that while conflict avoidance and management are writ large, there seems to be no emphasis at all on the promotion of complementarities (e.g., complementary coastal and ocean uses).⁹²

Legal factors

The strategy is cautious in dealing with sensitive constitutional issues. There is thus due respect paid to: the provinces’ primary responsibility for provincial lands, shoreline and specific seabed areas; municipalities’ responsibility for many land-based activities that have an impact on the marine environment; and aboriginal rights as recognized and protected by the *Constitution Act, 1982* and treaty rights.⁹³ The strategy also recognizes that the various government bodies have to operate within their existing statutory mandates.

It is interesting to note that a stated commitment of Canada is to play an international role in ICOM. Canada, a main beneficiary of the *UN Convention*, recognizes that the “maintenance and preservation of sovereignty over national ocean space is ... a fundamental right in

⁹⁰ *Policy and Operational Framework*, note above, at 36.

⁹¹ *Oceans Strategy*, note above, at 11.

⁹² See for instance the definition of integrated management: “A continuous process through which decisions are made for the sustainable use, development, and protection of areas and resources. IM acknowledges the interrelationships that exist among different uses and the environments they potentially affect. It is designed to overcome the fragmentation inherent in a sectoral management approach, analyses the implications of development, conflicting uses and promotes linkages of development, conflicting uses and promotes linkages and harmonization among various activities.” *Policy and Operational Framework*, note above, at 36.

⁹³ *Oceans Strategy*, note above, at 7.

international law and is a priority for Canada.”⁹⁴ In this regard, Canada has repeatedly stated its intention to become a party to the *UN Convention* and indeed repeats this commitment in the strategy.⁹⁵ In relation to the transboundary management of straddling stocks and highly migratory fish stocks in particular, Canada continues to use the absence of an effective enforcement regime as a reason to stay out of the treaty. Instead of working within the existing international legal framework, Canada believes that it can be more effective in regime-building by working as an outsider, rather than insider. The authors suggest this continued posturing detracts from Canada’s ability to exercise the international leadership it seeks in the strategy, and more specifically to advance Canadian and global ocean-related interests broadly and proactively.

Institutional factors

Collaboration between the various governments and within each level of government is identified as a core commitment to ocean governance.⁹⁶ There is recognition that almost every federal government department or agency is involved in ICOM in some manner.⁹⁷ In effect this means that over 20 bodies have an interest stemming from their mandates. However, although many of these have a strong marine mandate (e.g., Department of Transport and Department of the Environment), perhaps only two federal departments have a wide ICOM mandate, whether explicitly or implicitly. The first is DFO, which has the explicit lead role in integrated management in the *Oceans Act*. The second is Environment Canada, whose jurisdiction is implicit in relation to all activities that have an adverse impact on the marine environment (e.g., pollution, wildlife protection). Other departments play a lead role for their particular sector or area of marine concern (e.g., Department of National Defence). In the marine transportation area, the Department of Transport is the maritime administration of Canada, but the Canadian Coast Guard is part of the DFO. Accordingly, it is to be expected that in this sector close cooperation between these two departments is necessary.

In the interests of the integrated approach under the strategy, there will need to be collaboration and coordination not only among federal bodies, but also with and among provincial and municipal governments. At a level of generality, the strategy proposes to use new and existing institutional mechanisms such as committees and boards for this purpose.⁹⁸ Given enduring departmental turfing at the federal level and occasional federal-provincial turfing, there

⁹⁴ Ibid., at 17-18.

⁹⁵ Ibid., at 5 and 17.

⁹⁶ Ibid., at 18.

⁹⁷ *Oceans Strategy*, note above, at 6.

⁹⁸ Ibid., at 19.

is no indication of how the lack of cooperation and occasional competition will in fact be addressed. Moreover, line departments do weigh their participation and expected benefits against actual costs. The strategy is unclear as to whether and how line departments would be expected to shoulder the costs of an integrated management initiative under the lead of another department, when their primary concern will be with the performance of the “core” of their (sectoral) mandate.

Participatory processes

According to the strategy “[T]he governance model proposed for integrated management is one of collaboration.”⁹⁹ In addition to governmental cooperation discussed above, the strategy foresees broader social participation in three ways. First the process of integrated management will result in the establishment of advisory bodies. Although the strategy is silent on their actual role and composition, it would seem that the collaborative approach advocated throughout the strategy would lead to the inclusion of stakeholders. Second, where an integrated management body is created, composition would include governmental and non-governmental persons. Stakeholders will play more than an advisory role: “[P]articipants take an active part in designing, implementing and monitoring the effectiveness of coastal and ocean management plans, and partners enter into agreements on ocean management plans with specific responsibilities, powers and obligations.”¹⁰⁰ Second, there will be specific situations where co-management can take place, although this type of management is unnecessarily conceived only with reference to aboriginal communities and not to coastal communities generally.¹⁰¹ Given the pervasiveness of co-management in many parts of the world and growth in Canada, the strategy does not give this form of management much attention or scope of application, and leaves it more as a prescription for “specific” cases, rather than promoting it as a more general practice.

An innovation is then attached to stakeholder participation. Integrated management bodies (second and third situations above) will not only provide advice, but will “also assume responsibility for implementation of the approved management plan.”¹⁰² This is consistent with the “collaborative” governance approach advocated. How far this will be pursued remains to be seen. One experience with privatization of contingency planning and response led a federal commission to conclude that there are certain governmental responsibilities (i.e., contingency

⁹⁹ Ibid., at 19.

¹⁰⁰ Ibid. at 19.

¹⁰¹ Ibid. at 19. Co-management is defined as “[A] management approach in which responsibility for resource management is shared between government and resource user groups.” *Policy and Operational Framework*, note above, at 36.

¹⁰² *Oceans Strategy*, note above, at 20.

planning for environment protection) that should not be delegated.¹⁰³

What the strategy leaves uncertain in relation to these notions of active participation is who actually assumes responsibility when a problem arises as a result of the management action undertaken. This could be a potential problem in terms of having persons accountable for their actions, but at the same encouraging stakeholder participation. At its worst, participants could be exposing themselves to potential legal liabilities. In order to address this potential problem, it might be necessary (1) for the federal government to assume full responsibility, including for decisions that are not fully its own, or (2) to provide participants with liability exemptions for the consequences of decisions of integrated management bodies; or (3) to incorporate integrated management bodies. The impression given by the strategy is that this potential problem has not been given sufficient attention.

The *Oceans Act* already went to great lengths in establishing a duty to consult on DFO. The *Oceans Strategy* goes much further in developing, in a Canadian administrative law context, a legitimate expectation for stakeholders to demand that the federal government live up to the stated policy for an inclusive process in decision-making. Although the strategy does note that there will be occasions when consensus might not be possible, there is no turning back to the *dirigisme* that was the case in the past. ICOM decisions might be judicially reviewable if procedural fairness is not observed.

Resources

The *Oceans Strategy* is silent on costs of implementation and the resources needed. Currently, it has no separate budgetary allocation, and it is expected that elements of the strategy would be pursued in the context of current departmental programming and funding. The major challenge that the multi-sectoral strategy faces, and will continue to face, is how to receive a fairer share of a decreasing departmental budget which is still dominantly oriented towards sectoral concerns. Examples of activities that could be comprehended by the strategy over a four-year period (with no indication as to start date) are given. Some of these require doing current business in new ways, suggesting that the activities could be pursued within current sectoral programming and budget. New multi-sectoral activities, however, will necessitate new resources.¹⁰⁴

Evaluation

The strategy is conceived as an iterative or “rolling” strategy that would be updated on an ongoing basis as a result of knowledge gained and lessons learned from adaptive management. The strategy stresses the importance of measuring progress, relevance and effectiveness, but does not suggest ways how this might be done. This has great value for what is in effect a

¹⁰³ Gold, *Canadian Oil Spill Response Capability*, note above.

¹⁰⁴ *Oceans Strategy*, note above, 21-26, especially at 22.

management experiment. In order to do this it will be necessary to have a sophisticated evaluation process which currently does not exist. Such an evaluation process would need to integrate results-based management principles and approaches discussed earlier, and factor-in the introduction of change while the strategy is still being assessed against stated performance indicators. Change that is introduced on an ongoing basis is likely to make it difficult to measure strategy performance, especially if there is also change in performance indicators.

Eastern Scotian Shelf Integrated Management (ESSIM) initiative

The *Oceans Act* mandates the DFO to lead and facilitate the development and implementation of integrated management plans (IMPs).¹⁰⁵ To date, no one IMP has been established although there are integrated management initiatives under way on the three oceans of Canada.¹⁰⁶ ESSIM is one such initiative under federal leadership and covers a large part of the marine area off the Atlantic coast of Nova Scotia. This will be the focus of this part of the paper, but since ESSIM is *in fieri in statu nascendi*, the analysis provided below must be considered provisional. This provisional analysis is useful in that this initiative already provides valuable insights into the emerging trends and practices of integrated management in Canada. There are similar DFO initiatives for the Gulf of St. Lawrence and Pacific Ocean. Another major initiative for integrated planning is in the Arctic (Beaufort Sea), but it antecedes the *Oceans Act*.¹⁰⁷ Of all these initiatives, ESSIM covers the most extensive management area, has the largest number of participants of any Canadian integrated management initiative to date, “while at the same time providing an important national policy roadmap for future oceans management.”¹⁰⁸

Trigger

Consequent to the DFO’s *Oceans Act* mandate to lead and facilitate the development of integrated management plans, ESSIM has at least a legislative trigger. However, this on its own does not fully explain why it was this area of the Atlantic region, and not another among several

¹⁰⁵ *Oceans Act*, note above, s. 32.

¹⁰⁶ Matthew King, Assistant Deputy Minister for Oceans in DFO, reported that since 1999 there have been as many as 18 integrated management pilot projects on the three coasts. See keynote address by King, “Canadian Oceans Management,” in S. Coffen-Smout et al., eds., *Proceedings of the 1st Eastern Scotian Shelf Integrated Management (ESSIM) Forum Workshop*, Halifax, Nova Scotia, 20-21 February 2002, Canadian Manuscript Report of Fisheries and Aquatic Sciences 2604 (Halifax: DFO, 2002), at 57.

¹⁰⁷ Beaufort Sea Integrated Management Planning Initiative (BSIMPI) traces back its origins to the Inuvialuit Final Agreement in 1984 and which set up a resource co-management arrangement.

¹⁰⁸ King, note above, at 62.

candidates, that became the first such initiative in this part of the country. Of particular relevance to the genesis of this initiative is public concern over perceived threats to the rich marine life in and over a submarine canyon on the Eastern Scotian Shelf known as the Gully. Much of the Scotian shelf is covered by exploration licenses, mostly for gas. There are numerous other marine uses off Nova Scotia that are occasionally in conflict with one another, and most especially in conflict with fishing as the oldest and most widespread use of the area. These spatial interactions often result in uneasy relationships among coastal communities and between these communities and offshore developers.

Sable Island is located close to the Gully and is subject to conservation and management by the Sable Island Preservation Trust.¹⁰⁹ The Gully and its waters will be subjected to a separate regime of protection. Mounting conservation concerns had prodded the federal government to declare the Gully as an area of interest as a marine protected area and the adoption of the Sable Gully Conservation Strategy in 1997. This strategy recommended the initiation of integrated ocean management with an offshore focus in this area.¹¹⁰ The *Oceans Act* also tasked DFO with the leadership and coordination of the development and implementation of a national system of marine protected areas for the purpose of integrated management planning in Canada.¹¹¹

Problems and baselines

Although there are several actual or potential problems (e.g., conflicts between submarine cables and fishing in the same area; offshore oil and gas licencing and conservation concerns; etc.) the ESSIM initiative to date has not yet focussed on any one problem or problems (actual or potential). The initiative will eventually address both long and short-term objectives. It has been recognized that there should be prioritization of specific issues for immediate action. In effect, although the initiative has been triggered by perceived problems as well as a legislative mandate, the overall direction of the initiative is not problem-oriented. Actual problem definition is left for later. The key elements set out for an integrated management plan rely heavily on the definition of an area and within it eventually the identification of actual issues to be the subject of integrated management planning.¹¹² Criteria for the inclusion of issues in the IMP have been anticipated, and namely “(i) an issue that could involve multiple oceans use with social/economic benefits (i.e., inter-sectoral spatial and temporal conflicts); or (ii) activities that could result in

¹⁰⁹ See <http://www.sabletrust.ns.ca/> (accessed 3 November 2002).

¹¹⁰ *Sable Gully Conservation Strategy* (Halifax: Environment Canada, Canadian Wildlife Service, Atlantic Region, 1998), <http://www.ns.ec.gc.ca/reports/pdf/sable.pdf> (accessed 3 November 2002). On 27 September 2002 DFO released a discussion paper entitled “The Gully Marine Protected Area,” with a proposal for formal zoning.

¹¹¹ *Oceans Act*, note above, s. 35(2).

¹¹² *Proceedings of 1st ESSIM Workshop*, note above, at 29.

ecosystem impacts.”¹¹³ A concern with an issue-based approach in the future is that this might not enable proactive planning, but rather continue an issue-oriented response that has been much criticized in the past. ESSIM will need to hold a steady course and be able to operate at two levels, without one level derailing the other: the first should be medium to long-term planning and management objectives, and the second should be responsiveness to immediate problems, whether existing or as they arise.

Management area

It will be recalled that the *Oceans Strategy* provides for management at both large and small scales (LOMA, such as ESSIM; and coastal management areas yet to be initiated) and that these will draw from a mix of ecological and administrative criteria.¹¹⁴ The management area is perhaps one of the most unclear matters in the ESSIM initiative. At approximately 325,000 square kilometres, it covers only half of the Scotian Shelf. On the one hand the *Oceans Strategy* asserts that integrated management plans will be driven by ecosystem-based approaches. On the other hand, the definition of the ESSIM management area has very little ecosystemic basis and the marine space that will be encompassed is uncertain and confusing. The area currently covered by the initiative seems to have been inspired by various factors, mostly jurisdictional or administrative, and hardly any of which have any ecosystemic relevance.

First, if a large marine ecosystem were to be identified in the area, it would have to encompass the entire Scotian Shelf, whereas only the eastern part of the shelf is included in the initiative.¹¹⁵ The DFO has identified natural divisions,¹¹⁶ but these have been questioned.

¹¹³ Ibid., at 28.

¹¹⁴ *Policy and Operational Framework*, note above, at 15-16.

¹¹⁵ This was pointed out by participants to the *First ESSIM Workshop, Proceedings of the 1st ESSIM Forum Workshop*, note above, at 20. See also R. O’Boyle, ed., *Proceedings of a Workshop on the Ecosystem Considerations for the Eastern Scotian Shelf Integrated Management (ESSIM) Area*, CSAS Proceedings Series, 2000/014, <http://www.dfo-mpo.gc.ca/csas/science/rap/internet/pro2000-14.pdf> (accessed on 30 October 2002); Large Marine Ecosystems of the World home page, <http://www.edc.uri.edu/lme/Text/scotian-shelf.htm> (accessed on 30 October 2002).

¹¹⁶ “In terms of marine ecosystem considerations, the Oceans Management Area corresponds to an offshore ecozone based on oceanographic and bathymetric features. The Area is comprised of four distinct physiographic zones: (i) the inner shelf bordering the Nova Scotia coastline; (ii) the middle shelf consisting of several banks and basins; (iii) the outer shelf area with wide banks and the shelf break; and (iv) the continental slope and oceanic waters. Based on oceanographic conditions, such as currents, salinity and temperature regimes, a natural division is recognized between the eastern/central and western part of the Scotian Shelf (i.e., west of Halifax).” *ESSIM Initiative: Development of Collaborative and Management Process*

Second, the actual area coincides with an administratively defined fishing zone: NAFO divisions 4VW, bordered by 4WX to the west and 4V to the east.¹¹⁷ This suggests that fishery interests dominated the first cut at the management area and raises a fundamental question whether a sectoral boundary is useful for a multi-sectoral ecosystemic task.

Third, the eastern boundary coincided with the former Newfoundland-Nova Scotia offshore boundary, pursuant to the federal offshore accord legislation with the two provinces. This defined the limits of offshore licensing by the two federal-provincial offshore boards and thus provided some convenience.¹¹⁸ To complicate the jurisdictional matter this boundary has now been reviewed by an arbitration tribunal, and there is a new boundary which is considerably closer to Sable Island (to Nova Scotia's disadvantage!).¹¹⁹ This raises a question as to the eastern limit of the ESSIM as a significant part of the management area now falls within Newfoundland's offshore instead.

Fourth, the ESSIM area excludes the territorial sea (a 12M belt along the coast), and there does not seem to be provision for inclusion of the important territorial sea around Sable Island.¹²⁰ Although the stated intention of ESSIM is to address the offshore, the exclusion of the key territorial sea area will exclude a range of activities that have a significant impact on the Scotian Shelf ecosystem and which in effect are also a springboard for offshore activities. There is very little human activity in the ESSIM area which does not emanate from the coastal zone. Divorcing

(Dartmouth: DFO/Oceans and Coastal Management Division, November 2001), at 10. In response to this, several participants (including DFO) at the 1st ESSIM workshop expressed the view that the proposed ESSIM boundaries carried an element of superficiality and did not reflect ecological concerns. See *Proceedings of the 1st ESSIM Forum*, note above, at 5-6, 14, 20, 31, 45.

¹¹⁷ See *Development of Collaborative and Management Process*, note above, at 9.

¹¹⁸ Schedule 1, *Canada-Nova Scotia Accord Act*, note above, Schedule 1. The Newfoundland counterpart does not contain such a precise and detailed definition of the offshore area.

¹¹⁹ *Arbitration Between Newfoundland and Labrador and Nova Scotia Concerning Portions of the Limits of Their Offshore Areas as Defined in the Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act and the Canada-Newfoundland Atlantic Accord Implementation Act*, Award of the Tribunal in the Second Phase, Ottawa, March 26, 2002, <http://www.boundary-dispute.ca/#Anchor-29754> (accessed 28 October 2002), paras. 4.32-4.36, 5.13-5.15. This award will probably necessitate an amendment to the *Canada-Nova Scotia Accord*, note above, Schedule 1 definition of the boundary between this province and Newfoundland.

¹²⁰ *Development of Collaborative and Management Process*, note above, at 9-10.

the offshore from the inshore defeats the rationale and purposes of the integrated approach, which normally requires consideration of the full range of interacting activities and cumulative impact (cause-effect relationships) on the ecosystem. One reason put forward is that the impact of land-based activities on the marine environment tends to be up to the 12M limit, but no scientific evidence for this is put forward.¹²¹ Again, this suggests that jurisdictional concerns (federal-provincial constitutional limits) may have been one deciding factor in addition to inshore water use complexities, such as coastal fisheries. The consequence of this exclusion is that the ESSIM area as defined is not justifiable neither on user nor on ecosystemic grounds.

Fifth, the seaward limits of the ESSIM area are also uncertain. ESSIM is supposed to extend to the full extent of Canadian seaward jurisdiction, in this case the extended continental shelf in accordance with the *Oceans Act* and the *UN Convention*. However, Canada has not defined its outer limits and what is legally certain at this time is the limit of the EEZ at 200M. In the case of Newfoundland, offshore exploration and development licences have been granted beyond 200M despite the absence of a formally defined Canadian outer limit.¹²²

Policy

The *Oceans Act* and the *Oceans Strategy* are the two major instruments that set out the policy framework for ICOM in Canada. In the case of the ESSIM initiative, however, the principal policy guidance has come not from the strategy, but from the act. Since 1999 the bulk of the initiative has run parallel to the development of the *Oceans Strategy*, with the strategy making a belated appearance as Canada's national ocean policy only in the summer of 2002. By this time, the ESSIM initiative was already well-defined and with a proposed structure. The *Oceans Act*, on the other hand, because it performs the function of legislating the policy framework and directions for ICOM, and despite its high level of generality, served to guide the development of ESSIM. It is also conceivable that because ESSIM had conceptually advanced ahead of the strategy by the time of the 1st ESSIM Forum Workshop, that the latter served to inform the former. There is little to suggest that the strategy added much to the ESSIM initiative which was not already anticipated and factored into. If this observation is correct, it suggests that at least insofar as this particular initiative in the Atlantic region is concerned, initiatives at the national level may tag along regional initiatives and that leadership in ICOM is more likely to be exercised at the frontline than at headquarters. The "learning-by-doing" approach at the operational level is more likely to guide this initiative than a highly generic national ocean policy.

Because of its complexity and novelty it is difficult to judge the degree of efficiency in

¹²¹ Ibid., at 10.

¹²² The formal definition of the outer limit would be by the Governor-in-Council acting upon the recommendation of the Minister of Foreign Affairs. *Oceans Act*, note above, s. 25(a)(iv).

the launching of the ESSIM initiative. It remains to be seen how the significant stakeholder input at the 1st ESSIM Forum Workshop will be used to strengthen the initiative. However, as will be seen below in relation to participatory processes, ESSIM has to date paid meaningful attention to inclusive participation.

Legal factors

The ESSIM operates within the statutory framework of the *Oceans Act*, but should also be expected to be governed by other relevant statutes and regulations governing marine activities, such as the *Canada Shipping Act*,¹²³ *Fisheries Act*,¹²⁴ *Navigable Waters Protection Act*,¹²⁵ *Canadian Environmental Protection Act, 1999*,¹²⁶ and the *Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act*.¹²⁷ This is a substantial legal framework. The actual operational relationships between the general (*Oceans Act*) and dedicated (other statutes) legislation, mandates they confer on government bodies, rights granted to ocean users, and standards set out for various activities remain to be tested by an experimental integrated approach.

The offshore focus of the ESSIM management area avoids potential difficulties of property and jurisdiction with the province of Nova Scotia. As noted earlier, Nova Scotia has historically maintained its position that it brought into confederation maritime property, and much of this is arguably located within bays and inshore waters. In proximity to the ESSIM management area, Nova Scotia considers Sable Island part of the province and also levies a charge for the laying of transatlantic cables over submarine areas it considers to be part of the province. Property matters apart, the federal government retains jurisdiction for navigation, shipping and fisheries and this is a facilitating factor in promoting integrated management in the ESSIM area. There is no legal uncertainty in this regard.

Two constraining issues have already been alluded to earlier. The first is the lack of definition of the extended continental shelf, meaning that the full formal seaward extent of the ESSIM management area is not known and is thus subject to uncertainty. The second is the

¹²³ R.S.C. 1985, c. S-9. A new *Canada Shipping Act, 2001*, S.C. 2001, c. 26, has been legislated but is not yet in force.

¹²⁴ R.S.C. 1985, c. F-14.

¹²⁵ R.S.C. 1985, c. N-22.

¹²⁶ S.C. 1999, c. 33.

¹²⁷ An overview of federal, provincial and international regulatory frameworks applicable to the ESSIM region is currently being prepared by DFO. *Proceedings of the 1st ESSIM Forum Workshop*, note above, at 47-48.

implication of the potential for recognition of aboriginal resource constitutional rights in ESSIM. If the argument referred to earlier that aboriginal title is a form of encumbrance on crown title is pushed to its logical conclusion, then crown title over the resources of the EEZ and continental shelf are encumbered.

There is also a substantive body of international law that applies to the ESSIM area, as may have been implemented through statutes or simply applicable as a matter of treaty or customary law. This body is relevant from two perspectives, the first being Canadian subscription to international instruments it is a party to, and the second consists of entitlements of the international community to use the ESSIM area. Examples of the latter include the right of unimpeded international navigation through the EEZ and the laying of submarine cables.¹²⁸ Although Canada is not a party to the *UN Convention*, it should take into consideration whether the placement of offshore installations and structures or its conservation policies in the ESSIM area impede other legitimate uses and rights protected by customary law.¹²⁹

Institutional factors

There are four levels of government (federal, provincial, municipal and aboriginal) and over 20 federal and provincial bodies that could potentially be engaged in the ESSIM institutional framework.¹³⁰ The ESSIM initiative proposes a planning and management structure that includes three major bodies, all of which are encompassed in the ESSIM Forum. The ESSIM Forum for this purpose should be distinguished from the 1st ESSIM Forum Workshop, which did not include the full range of senior level representation expected in the area management structure yet to be established. Participants at the 1st ESSIM Forum Workshop noted that the proposed structure was unclear as to where authoritative decision-making lies and what the relationships among the major bodies would be.

¹²⁸ *UN Convention*, note above, article 58.

¹²⁹ *UN Convention*, *ibid.*, article 60. Article 60(1) provides that artificial islands, installations and structures and their safety zones “may not be established where interference may be caused to the use of recognised sea lanes essential to international navigation.” The right of innocent passage and the duty of a coastal state to warn of dangers to international passage is protected by international law. *Corfu Channel Case* (United Kingdom v. Albania), *ICJ Reports*, Judgment, 9 April 1949.

¹³⁰ See the introductory comments to the 1st ESSIM Forum Workshop of Neil Bellefontaine, Regional Director-General, DFO Maritimes Region, *Proceedings of the 1st ESSIM Forum Workshop*, note above, at 54.

The first ESSIM body would be the Regional Committee on Government Affairs (RCGA), which should consist of government representatives at the federal and provincial levels. Composed of senior government officials, this is the first level of government engagement and clearly this body will have executive decision-making authority.¹³¹ Perhaps the real concern at the 1st ESSIM Forum Workshop may not have been the lack of clarity in the relationships between bodies as much as the actual *locus* of the decision-making (i.e., a committee of senior government officials), which suggests that although the initiative is touted as collaborative and inclusive, in reality the ultimate authoritative decision remains a governmental one. A further issue with this body is the full extent of participation by aboriginal government. It is unclear whether the federal government will treat aboriginal governments as “governmental” partners or simply as stakeholders, although it is recognized that First Nation involvement would occur in all ESSIM bodies other than the Secretariat.¹³² It has been submitted that aboriginal groups are more than stakeholders. In addition, although the initiative recognizes the importance of municipalities, municipal governments are not included in this governmental structure. Presumably, two justifications might be that municipalities are creations of provincial governments (and therefore a provincial government *de facto* represents municipalities) and that the inshore is specifically excluded in the management area. Whereas the exclusion of municipalities logically results from the exclusion of inshore waters, one can anticipate a constraint in embarking on effective efforts to address marine pollution from land-based activities, where municipal governments have a significant role to play.

This raises a question as to what is, or should be, the role of the second ESSIM body, the Oceans Management and Planning Group (OMPG). This body consists of a plenary (the OMPG proper, which includes stakeholders and government officials at the planning, but not senior decision-making level), the Plan Implementation Working Group (PIWG), as an OMPG sub-committee, and works both within and outside the plenary, consists of government planning officials and also reports to the RCGA), and issues-based working groups (consisting of stakeholders and government officials). Much attention has been placed on the need to improve intergovernmental and interdepartmental coordination and this is reflected in the RCGA and PIWG. At the other end of the non-governmental spectrum, it is still moot as to how meaningful (i.e., to what extent there is involvement in decision-making) the structure and process in this second body really is. At the most, the OMPG can hope to influence decision-making by providing “information and advice” to the RCGA.¹³³ This was generally found to be unsatisfactory by non-governmental participants at the 1st ESSIM Forum Workshop.

¹³¹ *Development of Collaborative and Management Process*, note above, at 19. The precursor of the RCGA is the federal-provincial government working group established in January 2001. It consists of representatives of over 20 federal and provincial government bodies. Bellefontaine, note above, at 53.

¹³² *Development of Collaborative and Management Process*, note above, at 19.

¹³³ *Ibid.*, at 18.

The third body is the ESSIM Secretariat and generally has been viewed favourably. Its role is facilitation and coordination throughout the structure.

A matter which ESSIM has not addressed sufficiently is the sensitive subject of accountability. On the one hand transparency is evident throughout the whole process. The fact that the 1st ESSIM Forum Workshop has occurred and the manner in which it has occurred is a significant milestone in ICOM processes in Canada. The report of the workshop proceedings seems to have minimal if any bureaucratic filtering and thus contains some of the frankest reporting to date. Clearly, DFO (Maritimes) is committed to good process.

What remains to be addressed is the difficult question of accountability in the context of inclusive processes. As a public service provider, government is subject to an accountability system that elevates to a political level: “the buck stops here!” Clearly, any government department is responsible and accountable for its programmes. However, in ICOM the DFO is a lead agency, and frequently the role it will play will be coordination and facilitation, and may not necessarily be the implementing institution. It will be interesting to see how collaborating governments and departments will share responsibility and accountability in this scenario, and especially in the context of a consensus-building process. If the intention behind the RCGA is to define a decision-making moment, then those institutions participating in the decision should be accountable for that decision.

Ironically, that “decision-making moment” can be obfuscated if decision-making is further decentralized to enable more inclusive participation by stakeholders. Stakeholders are not necessarily public service providers and most likely represent special interests. The dominant view by participants at the 1st ESSIM Forum Workshop was that there should be greater participation in the decision-making. However, to what extent participating stakeholders could be held accountable together with government, and the form of this accountability, are moot. The potential problem arises where stakeholders participate in decisions that affect other interest groups (e.g., designation of MPAs in places and in a manner that cause loss to other users, e.g., offshore oil and gas industry).¹³⁴ The likelihood is that government, which cannot relinquish its public service responsibilities, will continue to be accountable for decisions, no matter how inclusive they are, and especially if they occur within its own policy framework.

Participatory processes

Although the *Oceans Strategy* and ESSIM are initiatives of the same department, the participatory process devised for the development of ESSIM is to be contrasted to that used to develop the strategy. As seen earlier, beyond the initial launch of the discussion paper and cross-

¹³⁴ E.g., MPA designation in areas already under offshore oil and gas licences. See Aldo Chircop and Bruce Marchand, “Oceans Act: Uncharted Seas for Offshore Development in Atlantic Canada?” 24 *Dalhousie Law Journal* 23-50 (2001), at 45-48.

country consultations shortly thereafter, strategy development remained for the most part an in-house affair until the release of the final document in the summer of 2002. In contrast, ESSIM was launched in 1999, various groups were consulted informally, two discussion documents were distributed in November 2001, an advisory committee of invited stakeholders was set up and a major workshop convened in February 2002 with over 150 participants. The workshop itself was novel in the manner stakeholders were able to react to components of ESSIM, and then to enable them to evaluate the workshop process. A survey was also conducted. At the end of the workshop stakeholders were invited to participate in the follow-up to the workshop. The workshop report is unusual for a government report in terms of its frankness. Irrespective of the substantive direction and content of ESSIM, the process to date is consistent with the collaborative approach advocated for ESSIM and suggests that stakeholder interest is likely to be maintained.

There are weaknesses to be addressed in ESSIM processes. The first relates to the status to be given to First Nation participation. ESSIM needs to re-examine its current characterization of First Nations as stakeholders with reference to the emergence of aboriginal government as an aboriginal right. This is a development which is not restricted to ICOM and it affects all federal and provincial initiatives.¹³⁵ Second, a significant gap in stakeholder participation to date is the absence of the transportation sector. This sector covers regulators, port authorities, industry (shipowners and service providers), and the various professions servicing the sector. Its relevance is manifold: it affects the regulation of all navigation in the ESSIM area, and consequently concerns all uses; standards for safety and marine environment protection are set at the international level, followed by domestic implementation (this will pose significant constraints to the use of regulatory tools in the ESSIM area); the transportation sector is responsible for Canada's seaborne trade. It is to be noted that DFO has recognized this weakness and there is commitment to include this vital sector in the next ESSIM development phase.

Given the diversity of interests that can be expected to continue to be involved in the development and eventual implementation of ESSIM it is to be expected that differences will frequently not be immediately reconcilable. It can be anticipated that a genuinely inclusive participatory process will serve as a conflict avoidance tool; however the ESSIM structure will need internal conflict management processes to address differences that mature into conflicts, such as, between levels of governments or between departments, multiple competing users, federal or provincial government and First Nations, First Nations and other fishing communities, and regulatory bodies and specific users or special interest groups. The *Oceans Strategy* recognizes that consensus-based decision-making may not always be possible and tough decisions may need to be taken when consensus cannot be reached.¹³⁶ ESSIM does not have a

¹³⁵ This difficulty has been recognised. See *Proceedings of the 1st ESSIM Forum Workshop*, note above, at 12, 38.

¹³⁶ With reference to integrated management bodies, "Even without the full endorsement or participation of some interests, some management actions will still proceed to meet existing jurisdictional responsibilities. For example, actions necessary for conservation can proceed under

similar proviso, yet. ESSIM could benefit from a mediation and conciliation service within its structure, but operating independently of ESSIM and probably also DFO.

Resources

the authority of the Minister of Fisheries and Oceans.” *Policy and Operational Framework*, note above, at 20.

Like the *Oceans Strategy*, ESSIM is not accompanied by separate financial appropriation, and no funding was announced at the 1st ESSIM Workshop.¹³⁷ Its principal resource is institutional. DFO (Maritimes) has designated the Oceans and Coastal Management Division to service this initiative, and eventually to become its secretariat. Other federal departments and the provincial government have been involved and this suggests that there are institutional costs for these participants as well. Several stakeholders participating in the 1st ESSIM Forum Workshop expressed concern over the time demands of volunteer participation.¹³⁸ However, these resources will not be sufficient for plan implementation.¹³⁹

Evaluation

At this early stage, no quality assurance system has been publicly discussed in anticipation of inclusion in the future integrated management plan for the ESSIM region. A preliminary desk assessment of knowledge and institutional capabilities to address ecosystem objectives has been undertaken.¹⁴⁰ A draft integrated management plan will be developed for submission to the 2nd ESSIM Forum Workshop scheduled for March 2003.¹⁴¹ The drafting process is expected to include management objectives and indicators.¹⁴²

The Atlantic Coastal Action Program

¹³⁷ Assistant Deputy Minister King's keynote address is conspicuously silent on this point. King, note above, at 56-62.

¹³⁸ *Proceedings of the 1st ESSIM Forum Workshop*, note above, at 13, 21-23, and 32.

¹³⁹ One discussion table at the 1st ESSIM Forum Workshop had the following to say: "The table considered the plan elements as being too broad and unattainable. It stressed the need for prioritization with timelines for the short- and long-term, with ongoing monitoring. It also expressed the need to define the area and process for developing the plan. Support is needed - who will pay for the plan? It was cautioned that one industry could not fund all the elements." *Ibid.*, at 32.

¹⁴⁰ S. Coffen-Smout et al., "Ocean Activities and Ecosystem Issues on the Eastern Scotian Shelf: An Assessment of Current Capabilities to Address Ecosystem Objectives," (Ottawa: Canadian Stock Assessment Secretariat, Research Document 2001/095, 2001).

¹⁴¹ *Proceedings of the 1st ESSIM Forum Workshop*, note above, at 47.

¹⁴² *Ibid.*, at vii.

Not all ICOM initiatives in Canada derive from or necessarily operate under the auspices of the *Oceans Act*, *Oceans Strategy* or the leadership and facilitation of the Department of Fisheries and Oceans (DFO). In fact, for the past several decades, a number of other federal departments and provincial agencies have been developing and supporting ‘unofficial’ integrated coastal management initiatives across the country that are designed to address and are delivering on many of the principles and approaches espoused in current Canadian ICOM thinking.¹⁴³ Many of these initiatives are due, in part, to a growing desire and capacity of coastal stakeholders for a more participatory form of democracy and a maturing attitude by governments toward sharing responsibility for planning and management in coastal areas.

One example of a federally-initiated program of this nature, is the Atlantic Coastal Action Program (ACAP) which was launched by the Atlantic Region office of the federal environment agency (Environment Canada) in 1991.¹⁴⁴ ACAP was established to build the capacity of ecosystem-based communities throughout Atlantic Canada so that they could assume the lead in determining their own long-term goals and environmental priorities, build multi-sectoral partnerships in their communities, and undertake direct action to address local issues that constrain the sustainability of their watersheds and adjacent coastal areas.

At the time of writing ACAP is a network of 14 community-driven, watershed-based ecosystem initiatives located in the four Atlantic provinces. There are presently five ACAP sites in each of Nova Scotia and New Brunswick and two each in Newfoundland and Labrador, and Prince Edward Island.¹⁴⁵ With over ten years of experience in ACAP, there are a number of lessons learned that derive from objective analysis and day-to-day operation.¹⁴⁶

¹⁴³ For a discussion on past initiatives and historical development of ICOM in Canada see L.P. Hildebrand, *Canada's Experience with Coastal Zone Management* (Halifax: Oceans Institute of Canada, 1989).

¹⁴⁴ For a more in-depth description and analysis of ACAP, see Ellsworth, et al., note above.

¹⁴⁵ The sites/organizations are: Nova Scotia: Clean Annapolis, Pictou Harbour, Bluenose ACAP, ACAP Cape Breton and Sable Island; New Brunswick: Eastern Charlotte Waterways Inc., St. Croix, ACAP Saint John, Miramichi River, Madawaska; Newfoundland: St. John's Harbour, Humber Arm; Prince Edward Island: Bedeque Bay, Southeast Environmental. For details on and contact information for each ACAP organization see: http://www.atl.ec.gc.ca/community/acap/index_e.html (accessed 30 October 2002).

¹⁴⁶ See “Lessons Learned: Atlantic Coastal Action Program (ACAP),” <http://www.atl.ec.gc.ca/community/acap/lessons.html> (accessed 1 November 2002). For the full report see S. Moir, *ACAP: Lessons Learned*, a Moir Consulting report prepared for Environment Canada (Dartmouth: Moir Consulting, 1997).

Trigger

ACAP was established in response to both an increasing concern by the public about the environmental quality and sustainability of the Atlantic coastal zone and their growing demand to be more actively and meaningfully involved in the decisions concerning their future.¹⁴⁷

Problems and baselines

Before the establishment of ACAP in 1991, the most commonly held viewpoint within government was that problems, information needs and optimal solutions were 'known' by government experts and the challenge was to convince others of what they already knew. Communities, for their part, sometimes looked to government for answers to their local questions, and yet were often disappointed when the response did not appear to fit their circumstances. ACAP changed this mental model that both government and communities had of each other. Through ACAP, local citizens, Environment Canada staff, and other government and non-government stakeholders came together as peers to discuss concerns, exchange ideas, and negotiate their own interests. Realistic solutions have been developed and implemented that meet communities' environmental concerns, as well as their economic and social goals. Many of the solutions go well beyond the immediate scope of any single department or level of government, thus requiring an integrated approach. ACAP is an innovative attempt to overcome the litany of sectorally-oriented and government-controlled planning and management initiatives traditionally practised in Atlantic Canada and elsewhere.

In traditional public involvement processes, the public does not share in the responsibility or ownership of the proposed initiative since the need was not established by them and the ongoing implementation is usually totally out of their hands. There is, therefore, little incentive for the public to work for creative and alternative solutions, but only to criticize. Conversely, multi-stakeholder processes are by nature inclusive and recognize the rights of all interested parties to be at the decision-making table. Their decisions reflect a wide range of interests and ideas, and result in a better understanding of the constraints and opportunities facing each stakeholder. The group becomes the proponent and champion of the project or initiative, leading to greater ownership and responsibility.

¹⁴⁷ Various studies have documented environmental and resource degradation, increasing use conflicts and consequent socio-economic hardship. See for example P. B. Eaton, L. P. Hildebrand and A. A. D'Entremont, *Environmental Quality in the Atlantic Region 1985*, (Dartmouth: Environment Canada, Environmental Protection Service, Atlantic Region, 1986).

Management area

ACAP was designed spatially on coastal watershed-estuary management units¹⁴⁸ and functionally on community leadership. The 14 areas currently in the program range from medium-sized to large watershed-estuary complexes that contain several municipalities and vary from urban-industrial to rural-agricultural settings. As the *Oceans Strategy* excludes rivers and lakes, and by implication, watersheds, the watershed-based model employed in ACAP should play a complementary role to other integrated management initiatives developed by DFO.

The majority of the sites have tended to be of a small size, and where the watershed was large, the participating communities tended to be well-defined. The combination of small size and well-defined communities enables participants to more easily relate to the local impact of their actions or inactions.

Knowledge base

The first five years of ACAP were focussed on building the community organizations, their institutions, priorities and partners. The final product of the groups' first phase planning efforts was the formulation of a Comprehensive Environmental Management Plan (CEMP), consisting of a long-term strategy for the local ecosystem. While there was no one prescribed methodology that all sites had to or chose to follow, six components generally describe the process of developing a CEMP: (1) formation and incorporation of a multi-stakeholder organization that is representative of the community; (2) reaching consensus on an integrated community-based environmental, social and economic vision and well-defined use objectives for the future of the area; (3) developing a common set of goals and objectives for their ecosystem; (4) conducting an environmental quality assessment that includes gathering relevant data to determine baseline environmental conditions and the issues affecting environmental quality; (5) identification of remedial options to close the gap between existing and desired levels of environmental quality; and (6) reaching a broad consensus on an implementation schedule complete with timelines, a financial plan and the identification of those responsible for carrying out the necessary actions.

All sites have geographical information systems to integrate data from users, local knowledge and science.

Policy-making

In ACAP, the traditional role of government is shared with the local organizations that are established in each coastal ecosystem. Instead of government departments being the lead

¹⁴⁸ Each community initiative sets its boundaries pragmatically based upon the interests and the issues at hand; in each case, the watershed serves as the organizing spatial framework for their identified communities.

agencies that set policy and priorities, the communities assume this function at the local scale and the government agencies become partners in responding to their identified needs.

There has not been any conscious and systematic treatment of principles of sustainable development (as espoused in the *Rio Declaration*), but at the same time ACAP partners have been guided by a generalised sense of sustainability of the local ecosystems they are a part of and depend on. It is interesting to note that at this local level the discourse is not dominated by polished concepts employed by scholarly and bureaucratic elites, but rather by participants' basic perceptions of local problems and pragmatic responses.

Institutional factors

ACAP was founded on two basic premises. The first, is that complex coastal issues cannot be resolved without an holistic, inclusive, participatory, ecosystem-based approach that can influence behaviours that impact negatively on environmental quality and community sustainability. Second, that most solutions to environmental and natural resource management issues will not be effective unless the range of participants in coastal governance is expanded to include all those with a stake in the decisions that are taken concerning coastal resources and uses and that stakeholders are provided with the capacity and the opportunity to take ownership of issues and responsibility for their solution.

'Community' in the context of ACAP does not refer solely to traditional geographical or political conceptions. Community in this instance refers to the degree of 'common interest and unity' amongst social, economic and environmental stakeholders. The institutional actors in the local ACAP organizations include: municipalities, businesses and industries, universities, federal and provincial government agencies, non-government organizations, First Nations and environmental groups. Citizens at large also participate. Thousands of volunteers and youth are engaged on local priorities. The involvement of First Nations is also developing.

Perhaps the most important ingredient in keeping the ACAP organizations functioning is a capable and respected community coordinator who is hired, not by government, but by the local organizations. The coordinators and several project and administrative staff are the only paid individuals in the ACAP process at the community level; all other participants are volunteers. A concern, and occasional constraint, is "volunteer burnout." To address this problem, Environment Canada facilitates occasional volunteer training workshops and place a priority on recognizing and supporting their volunteers.

While the ACAP approach made intuitive sense to those at the community level, it was a bold step for the federal government in Canada. For government, the program has presented several challenges. These include: changing of the corporate culture from hierarchical, linear delivery to one of horizontal, or team delivery; shifting from the command-and-control model to one of enabler and facilitator (Environment Canada sits on ACAP committees as a stakeholder and not as controller); the adoption of information and data to meet community needs; the opening of effective communication channels; the redirecting of current programs and resources

to support community initiatives; and the recognition of management scenarios arrived at through community consensus.

To meet these challenges in their *modus operandi*, bureaucrats as individuals needed to develop new skills and perspectives. This shift occurred rapidly in those individuals who sit on the local ACAP committees directly (referred to as ‘Windows’)¹⁴⁹. These “windows” have repeatedly stated that they have found their work with communities to be one of the highlights of their careers in terms of what they have learned, and what they have been able to accomplish. It took more time, however, for the concept to infiltrate into and up the bureaucratic system to the point where senior management and departmental scientists understood the need and accepted this sharing of control.

ACAP organizations have had positive effects on their communities and individual and organizational behaviour, and have become major contributors towards local sustainable development. Strong partnerships, key alliances and multi-stakeholder membership are key components to the success of this process. Persons interested in local sustainable development or who are impacting the local environment are encouraged to participate. This open and inclusive approach has provided a cooperative forum for persons with competing views or who do not normally come together to work for common ends.

Participatory processes

A basic premise of ACAP is that the level of public participation in ICOM initiatives must go beyond the mere provision of information and consultation with the public. Rather than being government-driven, the participatory process is led by locally incorporated multi-stakeholder community organizations. The federal government involvement was in the form of seed funding and initial facilitation, but control rests with local participants.

Environment Canada is the federal government sponsor of the program and a partner in each of the ACAP initiatives. Like other partners, the federal government participates in direction setting, issues identification and the selection of appropriate responses to issues and priorities on a par with other participants. It contributes funds, information, expertise and services. Interestingly, by participating in this strategic manner the federal government is in effect achieving departmental objectives and desired results, such as improvements in air and water quality, characterization and remediation of toxic contaminants, habitat protection and restoration, weather and environmental prediction, and understanding and preparing for the

¹⁴⁹ An ACAP ‘Window’ is an Environment Canada scientist, engineer, economist, program manager or technical expert assigned (normally on a voluntary basis) to work directly with one of the ACAP organizations over the long-term. ‘Windows’ function as a two-way liaison between the department and the community organization’s Board of Directors, sitting as an *ex-officio* member.

predicted impacts of climate change. Like other partners, Environment Canada participates in those projects that are consistent with their mandate and objectives.

Resources

The first phase of ACAP (1991-1997) required a large portion of funding to be obtained from Environment Canada for planning, institution building and direct action projects. As the program and the local institutions matured, funding needed from the department declined steadily as partnerships grew and funding diversified. Today Environment Canada contributes fewer funds per site and provides other support. It enters into annual Letters of Agreement with each of the ACAP organizations and provides funds (\$50,000-\$60,000 per year), technical, scientific and program support to undertake planning, management and action projects in pursuit of departmental and ACAP organization objectives. Environment Canada works with the ACAP organizations to bring other federal and provincial departments as additional partners to local initiatives.¹⁵⁰

In turn, the actual implementation of plans of action is the responsibility of the local ACAP organizations. These organizations are expected to build local partnerships, secure additional funding from other sources and undertake work in the field.

In addition to Environment Canada, other federal and provincial departments, universities, foundations and industries have partnered with ACAP organizations to provide further support. The diversification of partners, as well as funding has increased ACAP sites' sustainability and independence.

A concern in the eyes of the observer is whether ACAP sites are truly sustainable and could survive a hypothetical termination of Environment Canada funding, considering sporadic federal government funding cuts. It is likely that most sites would survive, but that some might face a difficult adjustment process, if not struggle. However, it is useful to consider the federal government contribution and its impact in a larger context. Local resources appear to be accessed and used efficiently. For example, of the total cash funding provided to all ACAP groups only 32% has come from ACAP. In addition to this funding, ACAP groups have received large contributions of donated labour, services, and materials. The modest \$12 million invested since ACAP's inception was used to leverage an almost \$100 million product by the ACAP groups themselves. In fact the argument in support of sustainability can be taken much farther. In terms of the impact of the local ACAP organizations on the Atlantic economy, a recent study of ACAP

¹⁵⁰ Environment Canada has developed Memoranda of Understanding with provincial agencies in New Brunswick and Prince Edward Island that facilitate greater coordination of and cooperation with community-based initiatives in those provinces. In Nova Scotia, 35 federal and provincial agencies are collaborating in support of government harmonization and streamlined service delivery to communities through an effort known as the Sustainable Communities Initiative.

over the five-year period 1997-2001 calculated the total GDP impacts to be in excess of \$22 million, a taxation impact of \$8.03M and the creation of 482 person-years of employment.¹⁵¹ The same study estimated that if Environment Canada had attempted to undertake the same suite of projects and activities that the 14 ACAP organizations have completed over the same period, it would have cost the department over \$71 million; a significant increase over the \$6.1 million invested. In summary, it does not appear that the existence of most individual ACAP sites, as distinct from the federal program that supports them, would be threatened if federal ACAP funds were to be terminated.

Evaluation

Like the other federal initiatives discussed in this chapter, ACAP did not start with a well-defined set of baselines and performance indicators to enable continual performance measurement of the program as a whole. There is no ongoing programmatic performance assessment but periodic external evaluations are conducted. However, separately from the programmatic level, each site has had a comprehensive environmental evaluation and consequently baselines have tended to be defined on a site basis. Also at each site the major monitoring event is the annual general meeting at the site and in which participants and the public participate. Performance objectives are set annually at this level, and progress on these is the subject of the annual report.

Phase II of ACAP (1998-2003) focussed on implementing individual site strategies, expanding the ACAP network, and collaborating with others to better understand science and achieve measurable ecosystem goals. Phase III (2003-2006) will continue with the existing model and community partners, but will add more sites, continue to work with multi-stakeholder coalitions at a larger regional ecosystem scale, support greater networking and knowledge sharing among the sites, plus take more cooperative, theme-based approaches (e.g., sewage).¹⁵²

In terms of accomplishments to date, over 800 projects have been undertaken by the 14 ACAP organizations, involving hundreds of organizations and thousands of volunteers. Results have included pollution prevention programs for business and households, restored habitats, the establishment of new parks, the creation of artificial wetlands for enhanced sewage treatment, training and education workshops for youth and the unemployed, sustainable forestry

¹⁵¹ Gardner Pinfold Consulting Economists Ltd., "An Evaluation of the Atlantic Coastal Action Program (ACAP): Economic Impact and Return on Investment," Report prepared for Environment Canada (Halifax, 2002).

¹⁵² The Bay of Fundy Ecosystem Partnership (BoFEP) and the Southern Gulf of St. Lawrence Coalition on Sustainability are two larger regional ecosystem-based initiatives in Atlantic Canada that receive support and partnership participation from Environment Canada and many other government agencies. See <http://netshop.net/~bofep/> (accessed 9 November 2002) and <http://www.coalition-sgsl.ca/indexe.htm> (accessed 9 November 2002).

management plans for industry and landowners, reforestation of riparian zones, the development of environmental farm plans, scientific research studies,¹⁵³ air and water quality programs, climate change projects and shellfish remediation activities. In some sites there has been a significant spill-over of activity outside the original environmental realm to include crime prevention, health education, youth training and employment.

Additionally, several ACAP organizations have established community resource centres providing the public, students, businesses and educators with sustainability information and responding to various inquiries and concerns. Today, most ACAP organizations are considered reliable third-parties in their communities, trusted by all stakeholders and depended on for reliable information. ACAP organizations are also tackling priority region-wide issues. For example, ACAP convened a Coastal Communities Sewage Workshop in Lunenburg in October, 1999, and is now developing a regional strategy among all ACAP organizations and others to address the pervasive regional issue of inadequate sewage treatment.

ASSESSMENT

The buzzword syndrome

“Sustainability,” “integration,” “process,” “partnership,” “precaution,” “transparency,” “responsibility,” “accountability,” “stewardship,” “collaboration,” “ecosystem approach,” among others: the practice of ICOM in Canada is replete with buzzwords. It is unfortunate that concepts which should be useful for policy, planning and management are so frequently overused, misused or used loosely to the extent that their utility is severely diluted. Perhaps one of the major weaknesses of the *Oceans Strategy* is that it suffers from the buzzword syndrome: it places faith in repeated concepts without offering much substantive and action-oriented content. The concepts obviously provide political kudos, but little management content. In fairness, these concepts do carry underlying values and all initiatives need to at least formally acknowledge them; however, beyond the ritual of respect lies the task of articulating the “who,” “when,” “how” and “at what cost”, i.e., the *modus operandi*.

Comparing initiatives

A comparative exercise of the three initiatives leads to a number of observations.

The three initiatives were not triggered by crises or any one individual event. At the most, they were initiated as an exercise of a legal mandate and possibly under osmotic pressure

¹⁵³ A component of ACAP is “Science Linkages” which makes available \$250,000 per year for science and research projects that are jointly proposed, developed and implemented by one of more ACAP organizations in full cooperation with one or more EC scientists. S. Dech, “ACAP's Science Linkages Initiative: A Sound Investment in Science and Community,” Internal report prepared for Environment Canada, Atlantic Region (Dartmouth, 2002).

from a changing operational environment and public expectations. All three had or have a significant gestation periods. This suggests that integrated initiatives require trial-and-error and learning-by-doing accompanied by many inter/intra-institutional transactions. Compared with some past sectoral policies which had short gestation and specific triggers, such as a resource collapse or fiscal cuts, the three initiatives were not “jolted” into existence. Thus integration initiatives are less likely to be reflex reactions than crafted pioneering experiments.

With reference to a problem-oriented approach, ACAP is perhaps the clearest of the three initiatives in terms of what it hopes to achieve. A management area is a combination of community, watershed and estuary functioning as a system. This approach seems to have worked, but at the same time it should be remembered that the scale was local. ESSIM is also local, but on a larger scale. The definition of the management area is spatial, possibly use-biased, and not problem-oriented. The extent to which an ecosystem-based approach will work in a spatially defined management area remains to be seen, but then the focus is on the offshore, not inshore, and thus fewer user conflicts can be expected. The *Oceans Strategy* is national in scope and provides a framework for LOMAs and coastal management areas. Again, it is more spatial in orientation than problem-oriented. It is suggested that the future relevance of the *Oceans Strategy* and ESSIM will depend on the extent to which they will allow smaller scale local problem-oriented (proactive and reactive) approaches.

All three initiatives support an integrated approach to knowledge. The *Oceans Strategy* and ESSIM do not indicate how the natural science will actually relate to social science, user and aboriginal knowledge. A challenge for DFO as a lead agency is to articulate an approach to knowledge-building that is seen to be efficient and equitable, while not being unduly biased towards natural science, its traditional knowledge base. ACAP offers a lesson here in terms of how local knowledge of the area is married to the scientific and technical support provided by Environment Canada in playing a facilitating role. But in all three cases, there is still experimentation in terms of the multi-disciplinary inputs into decision-making and the interdisciplinary decision outputs.

The policy experience is different in the three initiatives. ACAP enjoys a simple policy environment, administered mostly by one federal department and applied at the regional level. Because Environment Canada provides seed money to generate local integrated planning and management initiatives, it is not *dirigiste*. The *Oceans Strategy*, on the other hand, is the policy expression of a department mandated to play a national lead role by statute. The dilemma for DFO is two-fold: (1) scope-versus-focus in the strategy; (2) no prejudice to the mandates of other departments. The generality of the strategy has to compete with the specificity of sectoral policies, while hoping to provide a coordinating framework that involves departments that do not have a counterpart duty to follow to the DFO’s duty to lead. As a result, the *Oceans Strategy* tries to be everything to everyone without stepping on anyone’s toes. ESSIM commenced before the policy environment of the *Oceans Strategy* was created and is unlikely to be affected by any perceptions of a weak national policy. On the contrary, ESSIM is more likely to be perceived as providing content to the strategy at the regional level and perhaps further influence its development as a result of regional experience.

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The legal factors have produced the same constitutional constraints to all three initiatives. Environment Canada had to take into consideration the interests and views of Nova Scotia over Sable Island as a new ACAP site. It also needed to ensure support for initiatives in all four Atlantic provinces. The Oceans Strategy had to ensure intergovernmental partnerships and involvement of First Nations. This underlies the federal and aboriginal constitutional realities in Canada and is further mandated by the *Oceans Act*. It will not be possible to undertake the coastal side of ICOM without full provincial participation. ESSIM is also reflective of the constitutional constraint: DFO has chosen to focus the initiative to the offshore where there are potentially fewer constraints at a distance from provincial shores and inshore waters. Even in the offshore, however, ESSIM has to contend with the realities of federal-provincial boards for offshore development (themselves constituting a politico-constitutional compromise) and claims of aboriginal peoples. Also, ESSIM has to contend with rights of offshore actors (e.g., licenced offshore operators) acquired under other departmental sectoral legislation.

Together with the constitutional framework, the institutional issues are a major constraint. ACAP overcame potential institutional difficulties early by working out compromises with individual provincial governments. But then Environment Canada had less of a need to work closely with other federal departments than DFO in the context of the *Oceans Strategy* and ESSIM. As pointed out, DFO has legal duty to lead, but this does not have a counterpart duty for other departments in the *Oceans Act*. The consequence is that DFO's transaction efforts and costs can be expected to be significantly high, and with no new financial resources allocated to oceans, its ability to influence the behaviour of other departments is necessarily constrained. The alternative for DFO is to avoid turfing and exercise less of directing lead role in favour of a broader consensus-based approach with other federal departments, in order to promote buy-in and cross-departmental commitment of resources.

There are significant novelties in the participatory processes promoted by ACAP and ESSIM. ACAP now has an established local decision-making and implementation process led by coastal communities and facilitated, not directed by the federal government. Although not all potentially important stakeholders are involved, the ESSIM development process likewise has a creative and successful approach to stakeholder involvement. The promotion of inclusive participation is no longer purely a matter for administrative discretion, but one of legal necessity under the *Oceans Act* and procedural fairness in an administrative state.

It remains to be seen whether ESSIM can maintain the process and pace it has set without new departmental financial resources. The danger is that demanding, but well-meaning stakeholders will expect follow-up at a time when resources are not available. If DFO were to slow down the process until funds are available, it could in turn affect credibility and continued involvement. Thus, although the ESSIM participatory process is highly credible, the expectations and demands of participants may be difficult to meet. And this is a major difficulty that will keep haunting DFO in exercising its oceans mandate: resources for oceans will likely have to come from resources for fisheries. In addition to intra-departmental difficulties, the department would also have to face the

wrath of a historically influential fisheries constituency. ACAP, on the other, has no such difficulty. Environment Canada is a contributing partner and its monies are in effect part of a more diversified resource portfolio. As a result, ACAP has greater prospects of continuity than ESSIM at this moment in time.

A difficulty shared by all three initiatives is the lack of baselines and specific performance indicators normally needed to monitor and measure progress against. The *Oceans Strategy* speaks to indicators in a general sense, but omits reference to baselines altogether. ESSIM has not yet started to address this issue. Without such framework in place, any assessment of progress is more likely to be open to subjective and political influences. It is suggested that an ICOM evaluation approach still needs to be developed.

CONCLUSION

In conclusion, a qualitative and comparative weighing of key factors suggests that the ICOM experience in Canada is mixed and significantly more complex than the exchange between the Parliamentary Committee on Fisheries and Oceans and the federal government presented at the beginning of this chapter suggests. There is much more to ICOM than the *Oceans Act*.

Although it is not possible to determine whether any of the three initiatives presented have bettered the marine environment, this being a long-term impact evaluation issue, it is possible to assess the process of crafting, articulating and implementing an integrated approach. A major achievement is clearly the novel and creative participatory processes at the regional and local level. Inclusive participatory processes are truly consistent with the commitment to the integrated approach. In the case of ACAP, other significant achievements are consistency, resource-diversification and continuity. Major under-achievements are the insufficient management of inter-institutional relations (in the context of departmental and constitutional turfing), continued lack of federal resources for ICOM at the regional and national levels (which suggests insufficient profiling of oceans on the national agenda) and absence of appropriate monitoring and evaluation frameworks.

Finally, would ICOM in Canada fare better if Canada were a unitary rather than a federal state? Probably yes. Federalism requires a continuous management of the relationships that keep the individual parts attached to the greater whole while allowing diversity to flourish. Most unitary states do not have to contend with this process as a premise. ICOM is complex enough in terms of the high degree of integration needed. As a result ICOM in Canada is competing with tough national issues and is easily marginalised when resources at the national federal table are scarce and issues are prioritized. Where should this leave the ICOM policy maker, planner and manager? There is a lesson from ACAP that sticks out: local, small, community-centred, inclusive and low-resourced ICOM initiatives now have a proven track record.